No. 89-362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF THE ADOPTION OF: JOHN DOE,
INFANT BABY BOY:
RICHARD ROE AND MARY ROE,
Petitioners,

v.

BOB DOE AND JANE DOE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

IN THE CONTEXT OF A NEWBORN ADOPTION, IS IT A DENIAL OF DUE PROCESS TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WHO FAILED TO GRASP HIS OPPORTUNITY TO ASSUME PARENTAL RESPONSIBILITIES BY INTENTIONALLY WITHHOLDING MEANINGFUL, NEEDED PREBIRTH EMOTIONAL AND ECONOMIC SUPPORT TO THE PREGNANT MOTHER AND UNBORN CHILD FROM THE FIRST MOMENT HE LEARNED OF JOHN DOE'S RECENT CONCEPTION, THROUGH THE CHILD'S BIRTH, AND UNTIL SUCH TIME AS *AFTER* JOHN DOE HAD BEEN PLACED IN THE ADOPTIVE HOME IN RELIANCE UPON THE NATURAL MOTHER'S EXECUTION OF A VALID CONSENT.

II

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE AN UNWED FATHER'S PARENTAL RIGHTS, FOR THE REASON THAT HIS PARTICULAR PREBIRTH CONDUCT CONSTITUTED ABANDONMENT, WHEN FLORIDA'S STATUTORY BASIS OF ABANDONMENT (§ 63.072) SUBJECTS ALL PARENTS TO POTENTIAL LOSS OF PARENTAL RIGHTS WHEN THEY ABANDON THEIR CHILDREN, AND SAID STATUTORY BASIS IS FACIALLY NEUTRAL AS TO GENDER AND MARITAL STATUS?

III

IS IT A DENIAL OF DUE PROCESS AND EQUAL PROTECTION GUARANTEES TO PROHIBIT A BIOLOGICAL PARENT FROM WITHDRAWING HIS OR HER KNOWING AND VOLUNTARY WRITTEN CONSENT ABSENT A SHOWING SUCH CONSENT IS TAINTED BY LEGAL DURESS OR FRAUD?

IV

IS IT A DENIAL OF AN UNWED FATHER'S DUE PROCESS RIGHTS TO ADDRESS THE ISSUE OF STATUTORY

ABANDONMENT IN A CASE-BY-CASE ANALYSIS OF WHETHER HE AFFIRMATIVELY ACTED OR FAILED TO ACT AS A RESPONSIBLE PARENT TOWARD THE PREGNANT MOTHER AND HIS UNBORN CHILD BEFORE THE MOTHER RELINQUISHED HER PARENTAL RIGHTS IN AN EFFORT TO PROVIDE FOR THE BEST INTERESTS OF THE CHILD AND HERSELF?

THE PARTIES

Respondents, Bob and Jane Doe, are the adoptive, psychological parents of a little boy named John Doe. The Respondents join the Petitioners in requesting that the record from the lower courts continue to be sealed to help preserve the privacy of all impacted by this litigation.

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The opinion of the Supreme Court of Florida is reported as *Doe v. Roe*, 543 So.2d 741 (Fla. 1989) [App. 1a]; that of the intermediate appellate court as *Roe v. Doe*, 524 So.2d 1037 (Fla. 5th DCA 1988) [App. 23a]. The decision of the trial court is unreported [App. 40a]. All three (3) decisions are attached in the appendix. Both the intermediate appellate court and the Supreme Court of Florida accepted the extensive factual findings contained in the trial court's Order granting the adoption of John Doe by Respondents. [App. 40a]

STATEMENT AS TO JURISDICTION

The test for whether the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257 is not met merely because Florida's adoption statute was sustained as against the Petitioners' claim of repugnancy to the United States Constitution. Accordingly, this Court should not grant certiorari merely to re-examine the validity of Chapter 63, Florida Statutes. The root issue in this case was not a federal question, but, rather, turned on the evidentiary question of whether a biological father's prebirth conduct was relevant to the question of whether he had abandoned the child as it relates to the need for paternal consent. The Florida Supreme Court concluded that prebirth conduct *was* relevant to the issue of abandonment under Chapter 63 (and therefore was admissible) since prebirth conduct does tend to prove or disprove material facts bearing on the issue of abandonment. The Court also based its decision on grounds relating to statutory construction and legislative intent.

While the parent-child relationship represents a liberty interest protected under both the state and federal constitutions, it does not follow that Florida lacks the constitutional ability to limit parental freedom and authority once there's been a relinquishment of parental rights, either through a valid consent, or by abandonment. Petitioner Mary Roe relinquished her parental rights through the execution of a valid written consent untainted by legal duress or fraud. Petitioner Richard Roe relinquished his parental rights by virtue of abandoning his child, i.e., intentionally and willfully withholding prebirth support and medical expenses to the unborn child and the pregnant mother when such support was within his ability to provide and desperately needed. Because of his intimate knowledge as to both the pregnancy and the needs of the pregnant mother, his failure to assume parental duties in the form of providing prebirth support and medical expenses, constituted abandonment of the child and resulted in a forfeiture of the privilege of vetoing the adoption by refusing to give consent. Given the Petitioners' relinquishment of their parental rights, the Fourteenth Amendment did not bar the State of Florida from granting the adoption of John Doe to Respondents, Bob and Jane Doe.

STATEMENT OF THE CASE

Respondents oppose further review of a judgment which upholds their adoption of JOHN DOE, now three (3) years of age, over the objections of biological parents who were correctly held to have relinquished their parental rights at or about the time of John Doe's birth. The Florida Supreme Court rejected the biological father's argument that he had no parental

responsibility prior to John Doe's birth; and his related contention that his conduct of intentionally withholding prebirth support and medical expenses, was irrelevant as it relates to the need for paternal consent. Additionally, the Florida Supreme Court rejected the biological father's claim that the federal guarantees of equal protection and due process gave him a constitutionally-sanctioned automatic veto power over the adoption solely because of the biological connection. The Florida Supreme Court also rejected the biological mother's claim that the federal guarantees of equal protection and due process gave her the unfettered right to withdraw her written consent to the adoption, without any showing of fraud or legal duress, merely because of a subsequent change of heart or circumstance.

The Petitioners, Richard and Mary Roe, met in the summer of 1985 in Tempe, Arizona, and began a dating relationship which included sexual intimacy. (R.4, 310) They lived separately. At that time Mary was single and about 24 years of age. She held a bachelor's degree from the University of South Florida, and was working for very modest wages in a bank to support herself and a son who was less than a year old. (R.14, 17) Richard, also single, was approximately the same age and had some college education behind him. (R.22, 604-605) He was employed as a salesman in the solar equipment industry and was earning commissions averaging $1,300 a week. (R.9, 606-607)

In late December of 1985 or early January 1986, Mary discovered she had just become pregnant as a consequence of failing to obtain and use any birth control pills under a renewed prescription. (R.7, 310)

Richard was aware of the pregnancy by January and he relentless pressed Mary to abort the child since he was not ready to commit to marriage. (R.10, 631, 632) He did pay one month's rent for Mary during the time frame she could have legally obtained the abortion he desired. (R.640, 642) However, when Mary steadfastly refused to have an abortion, Richard made a conscious decision to withhold emotional and financial support, including medical expenses, from the pregnant mother even though he continued to "date" her and was aware that upon her subsequent loss of steady employment Mary was increasingly reduced to living off public welfare and private charity. (R.623, 624) Mary repeatedly told Richard that while she would not abort the child, she could not emotionally or financially raise yet another child as a single, unwed parent. (R.17,18) Notwithstanding his first-hand knowledge of Mary's pregnant condition and financial predicament, Richard made no effort to utilize either his own financial resources (which included substantial savings), or the available resources of his family to provide for the prenatal needs of his unborn child or the needs of the pregnant mother. (R.607-608, 615-616, 640-641) By late March or early April of 1986, when the time for obtaining a legal abortion had passed, stretching until some point in July of 1986, Richard was in favor of adoption. (R.20-21, 37-38, 45, 637) Although aware early on that Mary was in contact with Jewish Social Services in Phoenix to explore adoptive placement, Richard initially voiced no objection. (R.18, 168)

In July of 1986 Mary advised her mother in Florida of her predicament and asked her to seek suitable adoptive parents. At some point also in July Rich-

ard announced he was against Jewish adoptive placement, but he was still opposed to marriage and offered no meaningful support to Mary who was now destitute. Through contacts initially developed by her mother—Mary and her son, Benjamin, came to Florida to arrange for the Respondents to adopt her unborn child in a private adoption. Although Mary left Phoenix in late July without telling Richard, she initiated regular telephonic contact with him within six (6) days of her arrival in Florida. (R.26, 32) In this first call Richard learned Mary was in Florida and why she came. (R.26, 32)

As Florida law requires, Mary was interviewed and counseled by the Department of Health and Rehabilitative Services. (R.475, 493) During an August 12, 1986 interview and counseling session, Mary was shown a blank consent form and a waiver-of-notice form and read the same. (R.481) She was further advised as to the irrevocable nature of the consent in the absence of fraud or duress. (R.483, 484) She was cautioned not to sign the consent following the birth of the child if she had any doubts about giving the child up. (R.482) Mary indicated that she understood. (R.482, 483)

Unbeknownst to Respondents, Richard and Mary were in frequent and lengthy telephonic contact from August 8, 1986 until just before the birth of John Doe on September 12, 1986. (R.34-35, 87, 655) The subject of these phone conversations concerned their relationship. She refused his offer to return and live with him outside of a marriage relationship and repeatedly told him that the unborn child (believed to be of female gender) would be better off in a stable, two-parent home. (R.26, 27) While Mary did not pro-

vide Richard with the mailing address of the apartment Respondents had furnished to her and her young son, she did provide Richard with her Florida phone number two (2) weeks before giving birth to John Doe. (R.85, 653)

On Friday, September 12, 1986 John Doe was born. Two (2) days later on Sunday, September 14, 1986, Mary signed a consent to adoption, and on the following day John Doe was placed by the attorney handling the intermediary adoption with the Does where he has remained to this day. [App. 3a]

Upon hearing on September 15, 1986 that Mary had given birth to a male child Richard told his mother, "Mother, can you believe I have a son? I'm going to go get it." (R.774) He contacted Mary that same day with a marriage proposal. A joint decision was made between the two of them, at that time, to seek "return" of the child on the basis that Richard had not given written consent to the adoption. (R.39, 628-629, 719, 774)

By September 19, 1986, Richard had come to Florida where, upon advice of counsel, he signed an acknowledgment of paternity, as well as John Doe's birth certificate. (R.601) He has sought custody of John Doe since that date.

Under Florida's Adoption Act i.e., Chapter 63, Florida Statutes, an unwed father who timely files an acknowledgment of paternity with the Bureau of Vital Statistics brings himself within the category of unwed fathers whose consent is required, unless excused by the Court on a basis such as abandonment or desertion. FLA. STAT. § 63.062, § 63.072 (1985) [App.] An unwed father's act of filing a timely acknowledgment

of paternity secures for him a procedural due process right to be heard and to participate in an adversary hearing to determine whether or not his claimed parental privilege of vetoing the adoption, by refusing to give consent, was previously forfeited by his actions. *Guerra v. Doe*, 454 So.2d 1 (Fla. 3d DCA 1984). FLA. STAT. § 63.072(1) (1985) explicitly identifies "abandonment" as a statutory basis, and warrant, for the waiver of consent from a biological parent whose consent would otherwise be required under FLA. STAT. § 63.062 (1985).

Following the contested adoption proceeding held in May of 1987, the trial court entered judgment approving the adoption of John Doe by Respondents. In its Order, which contained extensive factual findings, the trial judge found that Mary had voluntarily consented to the adoption, that Richard's prebirth conduct estopped him from now opposing the adoption, and that his consent was not required because he had legally abandoned the child. The Court noted that since the case involved a newborn adoption, it necessarily followed that the putative father's conduct throughout the pregnancy term was relevant to the issue of abandonment. [App. 49a] Without relying on the finding as a basis for its final judgment, the Court also found that John Doe's best interests would be served by granting the adoption, and that serious psychological damage to the child could occur if he were taken out of his home. [App. 50a, 51a]

On appeal, the District Court agreed that Mary had voluntarily consented to the adoption and explicitly approved the trial court's factual findings—including the finding that John Doe could be seriously harmed, psychologically, if removed from the adoptive home.

[App. 24a, 31a] However, the District Court reversed the judgment of adoption due to its conclusion that Richard's prebirth conduct could not, as a matter of law, be used as a basis for excusing his consent on the ground of abandonment. [App. 37a, 38a] The District Court also concluded that John Doe's best interest was irrelevant. [App. 30a, 31a] To protect the child from harmful changes in custody, the District Court preserved the status quo pending the acceptance or denial and ultimate disposition of the case by the Florida Supreme Court.

On discretionary review, the Florida Supreme Court reversed the intermediate Appellate Court and reinstated the trial court's judgment granting John Doe's adoption. [App. 16a, 17a] Again, Petitioner Mary Roe's consent to the adoption was held to be valid and irrevocable. [App. 5a] In addressing the question of whether the biological father's consent to the adoption could be waived under the circumstances of the case, the Court defined the root issue as an evidentiary matter of relevance under the Florida Evidence Code and began its analysis by noting that Chapter 63 clearly reflects the Legislature's intent that *all* adoptive matters, including abandonment proceedings, are to promote and protect the best interests of the child. [App. 6a, 8a, 9a] Having determined that the welfare of the child is an element to be considered in an adoption proceeding, the Court soundly rejected Richard Roe's principal arguments that he had no parental responsibility prior to John Doe's birth, and that evidence of his failure to provide prebirth support was therefore irrelevant to the issue of abandonment. [App. 9a, 10a] The Court's rejection was grounded on its recognition that prenatal care of the pregnant

mother and unborn child is critical to the future mental and physical health of the child, and to the interests and needs of society as well. [App. 9a, 10a] Consequently, a biological father, wed or unwed, has the responsibility to provide support during the prebirth period. [App. 10a] Since prebirth conduct by an unwed father as it relates to the pregnant mother who needs the support of the father directly impacts upon the welfare of the child, the Florida Supreme Court held that Richard Roe's conduct of failing to provide prebirth assistance to Mary, when he was able and assistance was needed, was relevant to the issue of abandonment. [App. 10a, 11a]

Secondly, the Florida Supreme Court rejected the putative father's claim that Chapter 63 afforded him absolute veto power over the adoption through his act of formally declaring his biological connection to the child subsequent to the natural mother's execution of a valid consent. [App. 10a] In holding that Richard Roe's failure to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed, vested her with the sole parental authority to consent to John Doe's adoption and removed from Richard any privilege of vetoing the adoption, the Court explained:

> *The unwed mother who is unable to obtain needed support from the father is necessarily forced to take upon herself the entire responsibility for caring for the unborn child and for making necessary plans for the well-being of the child when born.* The intermediary adoption program which the mother selected here is one of the options provided by the state to protect the best interest of the child,

> the parents, and the state. *If the biological father retains an absolute veto power over the decision of the abandoned pregnant mother to place the child for adoption, the mother's ability to provide for the best interests of the child and herself are nullified. Clearly this is not legislative intent.* (emphasis supplied)

[App. 10a] The Court then added a caveat to its holdings by stressing that its judgment turned upon an analysis of the facts involved. In particular, the Court stated:

> We caution that this analysis cuts both ways. *In circumstances other than those here, an unwed father would be justifiably entitled to argue that his conduct in providing prebirth support to his unborn child was relevant to his claimed right to refuse consent to the adoption of his child.* (emphasis added)

[App. 11a] After having reached the aforementioned holdings on state law grounds, the Court then addressed and rejected the Petitioners' claims that the denial of their parental rights violated the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. [App. 11a-16a] In denying these claims, the Court noted that its evaluation of Petitioners' equal protection and due process claims, as meritless, was thoroughly consistent with this Court's decisions in *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); and *Lehr v. Robertson*, 463 U.S. 248 (1983).

REASONS FOR DENYING THE PETITION

Review by certiorari is not a matter of right, but of judicial discretion. It should be granted only when there are special and important reasons for doing so. Sup. Ct. R. 17.1. The Petition presents no basis for such review. To the contrary, the decision below was correct and should not be disturbed.

I THE UNWED FATHER'S FEDERAL EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE FLORIDA ADOPTION STATUTE AS APPLIED.

Although the parent-child relationship represents a liberty interest entitled to constitutional protection, principles of due process and equal protection do *not* require that an unwed father be afforded veto power over an adoption if he failed to seize as much parental responsibility toward the child as was reasonably possible under the circumstances. *Quilloin v. Walcott*, 434 U.S. 246, 255-256 (1978); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979); *Lehr v. Robertson*, 463 U.S. 248, 262, 266-268 (1983).

In making his various constitutional claims, Petitioner, Richard Roe, relies upon an extremely flawed analysis of the Florida Supreme Court's opinion in *Doe v. Roe*, 543 So.2d 741 (Fla. 1989), and an equally flawed analysis of this Court's prior decisions discussing the relationship between the assumption of parental responsibilities and biological fatherhood.

Contrary to Petitioners' assertion that the Florida Supreme Court used "an amorphous standard", Richard Roe's parental rights were terminated based upon *clear and convincing* evidence of abandonment stemming from his failure to assume parental responsi-

bilities toward his unborn child. The Florida Supreme Court explicitly stated its reliance upon the trial court's legal and factual findings, and there is no question but that the biological father's parental interest was terminated at the trial level upon a "clear and convincing" standard of proof. [App. 11a, 34a, 49a] *See generally Santoskey v. Kramer*, 455 U.S. 745 (1982), (due process requires the utilization of the "clear and convincing evidence" standard in parental rights termination proceedings in contrast to the "preponderance of the evidence" standard).

Nor is the decision in *Doe v. Roe, Id.* constitutionally defective or arbitrary simply because the question of whether a given biological father has or has not engaged in prenatal and postnatal conduct which evinces a settled purpose to assume parental duties turns on the individual facts of each case. As the Florida Supreme Court explained:

> [T]he issue of abandonment turns on the question of whether the parent has evinced a settled purposed to assume parental duties. Providing prebirth support to the unborn child is a parental duty. Evidence of whether the parent has or has not furnished customary support to the pregnant mother is relevant to the issue of abandonment. In answer to the certified question, we hold that an unwed father's prebirth conduct in providing or failing to provide support responsibilities and medical expenses for the natural mother is relevant to the issue of abandonment under 63.072(1). *We caution that this analysis cuts both ways. In circumstances other than those here, an unwed father would be justifiably*

> *entitled to argue that his conduct in providing prebirth support to his unborn child was relevant to his claimed right to refuse consent to the adoption of his child.* (emphasis added)
>
> * * * *
>
> Unwed mothers and fathers, indeed all parents, are subject to the loss of parental rights when they abandon their children. The issue here is whether evidence of prebirth conduct by a parent is relevant to the issue of whether the parent has abandoned the child. We hold that such evidence is relevant. Section 63.072 is neutral as to sex and marital status of the parent who has allegedly abandoned the child. The weight to be given prebirth conduct will vary from case to case depending on the conduct itself and other circumstances of the particular case, but, in as far as the particular prebirth conduct tends to prove or disprove that the parent has or has not abandoned the child at issue, such evidence is relevant and admissible regardless of the sex or marital status of the parent.

543 So.2d 741, 746-747 [App. 10a-12a]. Richard Roe's failure to show a substantial interest in his unborn child's welfare, as evidenced by his steadfast withholding of prebirth support from the pregnant mother, removed from him the full constitutional protection afforded the parental rights of other classes of parents. Consequently, the case-by-case approach of *Doe v. Roe Id.* is entirely consistent with this Court's recognition in *Lehr v. Robertson, supra* at 257 that:

> [T]he rights of the parents are a counterpart of the responsibilities they have assumed.

The Petitioners' assertion, at page 8 of their Petition, that the Florida Supreme Court "rejected the rulings of *Stanley, Quilloin, Caban,* and *Lehr*" is wholly unfounded since the Court quoted extensively from these cases (especially *Lehr*) in addressing Richard Roe's constitutional claims and the relationship between the assumption of parental responsibility and biological fatherhood. 543 So.2d 741, 747-749 [App. 12a-16a] The Court's reference to those cases as not being "directly on point" was clearly intended to stress that its decision rested on the state law grounds that: (1) evidence of whether a biological father has or has not furnished prebirth support to the pregnant mother is *relevant* to material facts bearing on the issue of abandonment under § 63.072(1); and (2) that it was *not* the legislature's intent in Chapter 63 to accord automatic, absolute veto power to an unwed father who has willfully refused to act as a parent toward his unborn child and the pregnant mother until *after* such time as the mother has placed the child for adoption in an effort to provide for the best interests of the child and herself. [App. 9a, 10a, 15a, 16a] Since the controlling issues of *Doe v. Roe* involved the independent state law grounds of evidentiary relevance and legislative intent, rather than a federal issue, further review by this Court would be inappropriate. *See generally, Michigan v. Long,* 463 U.S. 1032 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945).

Petitioners' assertion, also on page 8, that the Florida Supreme Court held that Richard Roe "ha[d] no standing in the adoption proceeding" is likewise base-

less. Here, Petitioners have blurred the distinction between Richard Roe's *standing* to participate in an adversary hearing on the issue of his claimed right to refuse consent to John Doe's adoption; and the question of whether his biological link to the child automatically clothes him with substantive veto power. Richard Roe clearly had standing to contest the adoption by virtue of filing an acknowledgment of paternity. The Florida Supreme Court explicitly recognized his standing when it said:

> The natural father here filed an acknowledgment of paternity in accordance with § 63.062(1) on the 19th of September, 1986. Thus, his consent was required unless he had previously abandoned the child.

543 So.2d 741, 745 [App. 8a]. But in rejecting his claim of absolute veto power, the Court stated:

> [W]e hold that the failure of Respondent natural father to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed, vested Respondent natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give consent.

543 So.2d 741, 749 [App. 16a]. Earlier, the Court had explained its rationale for rejecting Richard Roe's claim to absolute veto power when it observed:

> The unwed pregnant mother who is unable to obtain needed support from the father is necessarily forced to take upon herself the entire responsibility for caring for the unborn

> child and for making necessary plans for the well-being of the child when born. The intermediary adoption program which the mother selected here is one of the options provided by the state to protect the best interests of the child, the parents, and the state. If the biological father retains an absolute veto power over the decision of the abandoned pregnant mother to place the child for adoption, the mother's ability to provide for the best interests of the child and herself are nullified. Clearly this is not legislative intent.

543 So.2d 741, 746 [App. 10a].

Richard Roe's "parental rights" were not terminated on a whim of the Court or because he was a less-than-perfect parent. Rather, his parental rights were terminated because there was clear and convincing evidence that his prebirth conduct toward the unborn child and the pregnant mother constituted abandonment. It was well within the Florida Supreme Court's power to construe § 63.072 "abandonment" as encompassing prenatal conduct on the part of a parent, as well as postnatal conduct. 543 So.2d 741, 747 [App. 11a]. *See, Prince v. Massachusetts*, 321 U.S. 158 (1944), (a state court's construction of a state statute is not reviewable in the Supreme Court of the United States). *See also, Guaranty Trust Company v. Blodgett*, 287 U.S. 509, 512-513 (1933).

Relying on the particular facts involved, the Florida Supreme Court correctly determined that Richard Roe had lost or forfeited any veto privilege by failing to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed; and

that neither the provisions of Chapter 63, legislative intent, nor constitutional principles supported his claim that his formal acknowledgment of a biological link to the child gave him automatic veto power. Given the *Lehr* relationship between the assumption of parental responsibilities and biological fatherhood, it was clearly *not* a denial of equal protection or due process to terminate the parental rights of an unwed father who failed to grasp his opportunity to assume parental responsibilities by intentionally withholding needed prebirth emotional and economic support to the pregnant mother and unborn child from the first moment he learned of John Doe's conception, through the child's birth, and until such time as *after* John Doe had been placed in the adoptive home in reliance upon the biological mother's execution of a valid consent.

While the instant case differs factually from *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin supra*; *Caban supra*; and *Lehr supra*, since it involves a newborn adoption rather than the adoption of an older child—its analysis concerning the inchoate nature of the parental rights enjoyed by an unwed father, who has not shouldered parental responsibilities and whose only link to the child is the biological connection, falls squarely within the parameters already established by the aforementioned decisions of this Court. Contrary to Petitioners' claims, *Doe v. Roe's* application of constitutional principles is mainstream and does not present any particularly novel or dubious extensions of *Lehr* or its predecessors. For example, on page 11 of the Petition, the Petitioners assert that *Doe v. Roe* is contrary to *Santoskey* and *Quilloin* because it resulted in the termination of parental rights without a showing of unfitness. Petitioners' reliance on *San-*

toskey is poorly placed since *Santoskey* involved a "permanent neglect" proceeding—rather than any adoption consent issue. Petitioners' reliance on *Quilloin* (for the proposition that the rights of biological parents cannot be terminated in favor of adoption for any reason short of parental unfitness), could not be more misplaced since Quilloin was an unwed father whose failure to shoulder significant responsibility for his child resulted in his parental rights being terminated, and the adoption granted over his objection, without any finding that he was an unfit parent. *See also, Lehr v. Robertson, supra* (known, unwed father's parental rights terminated and adoption granted, over his objection, without any showing of parental unfitness because he had failed to grasp his opportunity to shoulder parental responsibilities).

While parents may not be stripped of parental rights lightly, it does not follow that Florida lacks the constitutional ability to limit parental freedom and authority once there's been a relinquishment of parental rights by means of a voluntary consent, or by means of failing to grasp the *Lehr* "opportunity interest" by not timely assuming significant responsibility for the child's welfare. Any parent, wed or unwed, fit or unfit, can relinquish his or her parental rights.

Quilloin and *Lehr* clearly refute Petitioners' basic premise that Richard Roe's parental "rights" cannot be constitutionally terminated, and John Doe's adoption granted over Richard's objection, when he is ostensibly a fit parent. Since this premise fails, the Petitioners have not demonstrated any real or "intolerable" conflict between this Court's decisions and *Doe v. Roe* which would justify the granting of

certiorari review. *See generally, Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923).

II THE BIOLOGICAL MOTHER'S FEDERAL EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN HER CONSENT TO THE ADOPTION WAS RULED IRREVOCABLE ABSENT PROOF OF FRAUD OR DURESS.

Given the fact that Petitioner Mary Roe relinquished her parental rights on September 14, 1986, when she voluntarily and intelligently signed a written consent form which proclaimed its irrevocable nature, Fourteenth Amendment considerations of equal protection and due process do not bar the State of Florida from thereafter limiting her ability to withdraw her consent absent a clear and convincing showing that her consent was obtained through fraud or duress. The Petitioners' arguments in this point suffer from several infirmities. Chief among them is a failure to take into account the enhanced ability of the state to constitutionally limit parental freedom and authority once there has been a relinquishment of parental rights. *See generally Prince v. Massachusetts, supra.* Therefore, it was Mary Roe's September 14, 1986 relinquishment of her parental rights which furnished Florida with the the authority to limit her ability to withdraw her consent prior to the termination of her parental rights by a judgment of adoption.

Florida's practice, under § 63.082(5) of making a natural parent's consent irrevocable absent a finding of fraud or legal duress exists in most other jurisdictions and stems from public policy considerations briefly alluded to in *Doe v. Roe, supra* at 744 when the Florida Supreme Court adopted the following rationale given by the District Court below:

> The trial court found the natural mother gave up the baby because of generalized social and financial pressures, but that no one exerted coercion, duress or fraud to procure her consent. Absent a finding of fraud, duress, or undue influence, a natural parent's consent to an adoption is valid and irrevocable upon execution of the written consent. This same rule exists in most other jurisdictions in an effort to balance the welfare and rights of the child in both sets of parents involved in an adoption. If consents to adoption were freely made voidable, the stability of adoptive families and the institution of adoption itself would be threatened.

(App. 4a, 5a) Moreover, the same public policy considerations undergird Florida's requirement that the parent seeking to withdraw consent carries the burden of showing fraud or duress by clear and convincing evidence if the substantial ramifications flowing from that parent's earlier relinquishment of parental rights are to be "derailed". Due to her prior act of relinquishment, Florida's restriction on Mary Roe's ability to withdraw her consent on the basis of a mere change of heart or circumstance does not violate federal due process guarantees.

Nor does the Florida Adoption Act violate federal due process guarantees because: (1) there is no judicial involvement in the consent procedure; or (2) because it provides inadequate notice to natural parents. As to the former concern, § 63.082(3)(a) and § 63.092 specify that the Department of Health and Rehabilitative Services is to interview and counsel the biological parent regarding the terms of the consent

form, its finality, and irrevocable nature to ensure that consent is given on an informed and voluntary basis. Further, the attorney acting as intermediary in a private adoption also has an active role pursuant to § 63.082(3)(a) in making sure the natural parent understands the consent form and its irrevocable nature. These provisions are certainly adequate to satisfy due process. From a factual standpoint, there is no question but that Petitioner Mary Roe was fully advised by both an HRS Representative *and* the intermediary attorney regarding the contents of the consent form and its irrevocable nature absent fraud or duress. (R.482, 354-355). As to the latter due process concern of notice, § 63.122(4)(c) specifies that notice must be given to any person whose consent to the adoption is required unless that person has consented to the adoption. However, under § 63.122(4)(d), any person who is seeking to withdraw consent is entitled to notice of the adoption hearing. Factually, both of the biological parents appeared and fully contested the adoption of John Doe.

As is easily gleaned from pages 11 through 13 of the Petition for Certiorari, the crux of Mary Roe's equal protection argument is that a parent who has relinquished his or her child for an "agency adoption" can freely withdraw that consent, whereas a parent in a "intermediary" or private adoption cannot revoke his or her consent absent a finding of fraud or duress. To substantiate this claim, she relies heavily on *In the Interest of I.B.J.*, 497 So.2d 1265 (Fla. 5th DCA 1986), *rev. den.* 504 So.2d 766 (Fla. 1987). The flaw in her equal protection claim is that it is bottomed on a gross mis-statement of Florida law. Specifically, the *I.B.J.* "dicta" which is so critical to the claim

was expressly disapproved by the Florida Supreme Court in *Doe v. Roe, supra* at 747 when it stated:

> Respondents' [equal protection] argument is misplaced for two reasons. First, the provision in § 63.082(5) that consents to adoptions may not be withdrawn, absent fraud or duress, is applicable in *all* adoption proceedings. Second, *In re I.B.J.* was a *dependency* proceeding under Chapter 39, as the court made clear, not an *adoption* proceeding under Chapter 63. To the degree that it suggests that a consent to adoption may be withdrawn at will, absent fraud or duress, we disapprove *In re I.B.J.* (emphasis added)

(App. 13a) In light of *Doe v. Roe's* disapproval of that portion of *I.B.J.* which suggested that consents to agency adoptions were freely revocable, and thus different from consents to intermediary adoptions, it is abundantly clear that Petitioners' claim to an equal protection violation is fabricated from wholecloth.

The manner in which Petitioners' "borrow" from and treat Chapter 39 Florida Statutes, titled "Proceedings Related to Juveniles" as if it were a competing adoption statute is likewise suspect. Chapter 39 governs juvenile delinquency and dependency cases. [App. 81a-100a] It is *not* an adoption statute. By its own terms, the Juvenile Justice Act limits its definitions to Chapter 39 proceedings. Its only relevance to adoption proceedings is that if a child is adjudicated "dependent" under Chapter 39 (for reasons of voluntary surrender, abandonment, abuse, or neglect), *and* there is a subsequent termination of parental rights—then *if* an adoption proceeding is later com-

menced under Chapter 63, the agency with legal custody of the child has the authority to provide the "parental" consent required by § 63.062 (1985). Contrary to Petitioners' assertions, Chapter 39 "surrenders" and Chapter 63 "consents" are not equivalent, interchangeable terms. Simply because Florida courts have, as a matter of convenience, turned to and utilized the statutory definition of "abandonment" found in Chapter 39 during the course of Chapter 63 adoption proceedings involving older children, as opposed to newborns, it does not follow that the two (2) chapters are intertwined in the manner Petitioners have suggested in their bid for this Court's jurisdiction.

III PETITIONER RICHARD ROE'S PARENTAL RIGHTS WERE TERMINATED IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As a statement of abstract principle, the Respondents could agree that the arbitrary termination of parental rights under an insufficient or vague standard of proof, and without a statutory basis, would be offensive to notions of due process. However, Petitioners' effort to portray the *Doe v. Roe* opinion as violative of that principle is without basis. In short, Petitioners can make this argument only by presenting to this Court an untrustworthy analysis of *Doe v. Roe* and the relevant provisions of Chapter 63.

As already addressed by Respondents at pages 12 through 17 of this Brief, Richard Roe's parental rights were terminated on the basis of clear and convincing evidence that his prebirth conduct toward the unborn child and the pregnant mother constituted abandonment. "Abandonment" under § 63.072(1) was the statutory basis supporting the judicial excusal of his

consent; and it was well within the power of the Florida Supreme Court to construe abandonment as encompassing prenatal conduct as well as postnatal conduct. Richard Roe's parental rights were not terminated for his mere failure to pay child support. Rather, his "rights" were terminated because he had *abandoned* his unborn child and the pregnant mother as evidenced by his failure to give emotional and economic support to the unwed mother when such support was within his ability to give and sorely needed.

Another reason that further review of this case is inappropriate is because the decision below turns solely upon an analysis of the particular facts involved. The Florida Supreme Court was absolutely correct in its recognition that a number of factors or "other circumstances" bear on whether an unwed father's conduct has evinced a settled purpose to assume parental duties. In another case, on another set of facts, a putative father's failure to provide prenatal support might not justify a finding of abandonment. For example, such a failure would be of less significance if the putative father was unable to assist financially or otherwise for some reason; if his efforts to provide meaningful prenatal support had been rebuffed by the pregnant mother; or if the pregnant mother had hid the fact of pregnancy from him and circumvented his opportunity to shoulder parental responsibility. However, no such mitigating factors were present here inasmuch as Richard Roe's failure to assume parental responsibilities was accompanied by full knowledge of the pregnancy, full knowledge of the extent of the unwed mother's financial and emotional stresses resulting from the unplanned pregnancy, and a pregnant mother who gave him

opportunity after opportunity to act as a parent throughout the full pregnancy term. His own testimony made it clear that, despite his vastly superior economic resources, he intentionally withheld prenatal support. (R.623, 624) He even had detailed knowledge of the private adoption arrangement involving Respondents yet chose not to take the first affirmative step to develop any tie to the child, apart from the biological connection, until after John Doe was placed in the adoptive home in reliance upon Mary's valid consent. It is because many factors are involved that the Florida Supreme Court stressed that its decision turned on the particular facts of the case. *Doe v. Roe, supra* at 746. [App. 11a].

Nor does the use of prebirth conduct, as evidence of abandonment, violate Richard Roe's due process right to notice. FLA. STAT. § 63.072(1) comports with due process by giving notice that a biological father whose consent is required (by virtue of meeting one of the criteria of § 63.062), is at risk of having the need for his consent judicially excused on the basis of abandonment. Richard's assertion that he had no parental responsibility during the prebirth period and was unconstitutionally "broadsided" when the Court construed Chapter 63 "abandonment" as encompassing both prenatal and postnatal conduct, is unconvincing unless *Doe v. Roe* could be realistically viewed as creating some new normative standard for biological fathers. Plainly, the Florida Supreme Court viewed its opinion as but *reflecting* legal and societal norms rather than forging new ones when it stated:

> Respondent natural father's argument that he has no parental responsibility prior to birth and that his failure to provide prebirth sup-

> port is irrelevant to the issue of abandonment is not a norm that society is willing to recognize. Such an argument is legally, morally, and socially indefensible.

Supra at 746 [App. 10a]

CONCLUSION

The Petition should be denied since it has presented this Court with no basis for certiorari review.

The Florida Supreme Court's judgment in *Doe v. Roe* rests upon independent state law grounds pertaining to evidentiary questions of relevance and admissibility, statutory construction, and legislative intent. Since the judgment is not predicated on a federal issue of a controlling nature, and since it turns upon an analysis of the particular facts involved, further review would be inappropriate. The Court below fully considered and correctly decided the issues of the case. Moreover, it is apparent from its analysis of Petitioners' federal constitutional claims that *Doe v. Roe* is entirely consistent with and follows the prior decisions of this Court such as *Lehr* and *Quilloin*. Consequently, the Petitioners have fallen far short of demonstrating any real or intolerable conflict between this Court's decisions and *Doe v. Roe* which would justify the granting of certiorari review.

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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In The Matter Of The ADOPTION OF John DOE, Infant Baby Boy.

No. 72593.

Bob DOE and Jane Doe,

Petitioners,

v.

Richard ROE and Mary Roe,

Respondents.

Supreme Court of Florida.
April 13, 1989.

Rehearing Denied June 1, 1989.

The Circuit Court, Orange County, Cecil H. Brown, J., entered judgment of adoption establishing parental rights to child in adoptive parents. Natural parents appealed. The District Court of Appeal, 524 So. 2d 1037, reversed and certified question to Supreme Court. The Supreme Court, Shaw, J., held that: (1) father's prebirth conduct in providing or failing to provide support responsibilities and medical expenses for natural mother was relevant to issue of whether natural father had abandoned child, making his consent to adoption no longer necessary under statute; (2) natural father's conduct constituted abandonment; and (3) constitutional rights of natural father and natural mother were not interfered with.

Quashed and remanded.

Barkett, J., concurred specially and filed opinion in which Kogan, J., concurred.

McDonald, J., dissented and filed opinion.

* * *

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SHAW, Justice.

We review *In Re the Adoption of John Doe*, 524 So.2d 1037 (Fla. 5th DCA 1988), to answer a certified question of great public importance. Art. V, § 3(b)(4), Fla. Const.

The facts of the case are fully set forth in the decision below which quoted extensively from the factual findings of the trial court. Richard and Mary Roe met in Tempe, Arizona, in the summer of 1985, and Mary became pregnant in January 1986. Richard did not want marriage and urged Mary to have an abortion because he was not ready to commit to marriage, felt financial pressure, and was troubled by the whole idea of the marriage. Mary refused to abort and upon loss of employment was reduced to living off public welfare and private charity. During the critical period, Richard failed to provide Mary with meaningful emotional or financial support. Nevertheless, they continued to see each other regularly and when the subject of adoption surfaced Richard initially voiced no objection. In July 1986, Mary advised her mother in Florida of her predicament and asked her to seek suitable adoptive parents. This was done and in late July Mary came to Florida to arrange for the Does to adopt her unborn child. Mary continued to maintain contact with Richard and advised him of the adoption arrangements in process. Richard now did not want the child placed for adoption, but still opposed

marriage and offered no meaningful support to the now destitute mother. The child was born on 12 September 1986, Mary signed the adoption agreement two days later, and the child was placed in the adoptive home on 15 September. Richard then announced his opposition to the adoption, proposed marriage to Mary, and came to Florida where he signed an acknowledgment of paternity and the child's birth certificate. The adoptive parents refused to voluntarily relinquish the child and went forward with an adoption petition in October. Richard and Mary married in November 1986. After a May 1987 trial, the court entered judgment approving the adoption. The trial judge found that Mary voluntarily consented to the adoption, that Richard's prebirth actions estopped him from opposing the adoption and that his consent was not required because he had legally abandoned the child. Without relying on the finding as the basis for judgment, the court also found that the best interests of the child would be served by the adoption because of bonding between the child and the adoptive parents. On appeal, the district court approved the factual findings of the trial court, agreed that Mary had voluntarily consented to the adoption, but held as a matter of law that Richard's prebirth conduct could not be used as a basis for abandonment and that his consent was therefore required under chapter 63, Florida Statutes (1985). The district court preserved the status quo, pending acceptance or denial of jurisdiction and ultimate disposition by this Court. The district court also concluded that there was no clear authority in Florida on the issue of prebirth abandonment and certified the following question of great public importance.

> CAN THE FAILURE OF A PUTATIVE UNMARRIED FATHER TO ASSUME SUPPORT RESPONSIBILITIES AND MEDICAL EXPENSES FOR THE NATURAL MOTHER WHEN SHE REQUIRES SUCH ASSISTANCE AND HE IS AWARE OF HER NEEDS, BE A BASIS FOR A TRIAL COURT TO EXCUSE HIS CONSENT TO

> THE ADOPTION OF THE CHILD, ON THE GROUNDS OF ABANDONMENT OR ESTOPPEL, PURSUANT TO SECTION 63.072(1), FLORIDA STATUTES (1985).

524 So.2d at 1044.

We first address the issue of the natural mother's consent to the adoption. The adoption here was performed through an intermediary. Pursuant to law, the natural mother was interviewed and counseled by the Department of Health and Rehabilitative Services on 12 August 1986. During the interview, Mary said she was an unmarried parent with one previous child and could not financially support two children as a single parent. She identified Richard Roe as the natural father but said, while he did not deny paternity, he had furnished no meaningful financial support and eschewed responsibility for the child. The terms of the consent, its finality, and irrevocability were explained to Mary and she indicated she understood. Mary said she had thought through her decision and, while it was difficult, she believed adoption was best for everyone. After the birth of the child, Mary executed a consent to the adoption on 14 September 1986 and the child was placed with the adoptive parents on the following day. Within days, Mary attempted to withdraw her consent, maintaining that she had consented under the duress of her personal circumstances and that, with Richard's later agreement to marriage, she now wished to keep the child. The trial judge found that Mary was fully aware of the consequences when she voluntarily executed the consent, that the consent had not been obtained by fraud or duress, and that she could not thereafter revoke her consent. We agree with and adopt the rationale of the district court below in affirming the trial court on this point.

> The trial court found the natural mother gave up the baby because of generalized social and financial pressures, but that no one exerted coercion, duress or fraud to procure her consent. Absent a finding of

> fraud, duress, or undue influence, a natural parent's consent to an adoption is valid and irrevocable upon execution of the written consent. This same rule exists in most other jurisdictions in an effort to balance the welfare and rights of the child and both sets of parents involved in an adoption. If consents to adoption were freely made voidable, the stability of adoptive families and the institution of adoption itself would be threatened.

Id. at 1041 (footnotes omitted).

Having determined that the natural mother's consent to adoption was valid and could not be revoked, we turn to the more troublesome issue of whether the natural father's consent to the adoption could be waived under the circumstances present here. The trial court found, and the district court agreed, that because of bonding of the child to the adoptive parents, the child would be psychologically damaged if it were removed from the adoptive home at that stage of the proceedings. The court held, nevertheless, "that the best interest of the child is not a relevant factor unless the child was legally available to be adopted." *Id.* at 1041 (footnote omitted). This broad statement requires qualification. The issue here was whether the natural father's conduct prior to acknowledging paternity on 19 September 1986 constituted abandonment, or, restated, whether the natural mother had the sole right and authority before that date to consent to the adoption. At that time, the child had only been with the adoptive parents for a period of days and bonding was minimal. Thus the child's best interest as evidenced by subsequent bonding to the adoptive parents was not a significant consideration in this case. This must be the rule because, otherwise, a tentative placement or erroneous judgment would be effectively unreviewable and we would have adopted a rule that physical custody, because of subsequent bonding, is determinative in contested adoptions. However,

this does not mean that the best interests of the child as evidenced by bonding to the adoptive parents is not relevant under other circumstances. For instance, there may well be circumstances where a natural father does not acknowledge or declare a parental interest in the child until after the child has been with the adoptive parents for a significant period of time during which substantial bonding has occurred. In such a case bonding would be a material consideration on the issue of abandonment. The child's well-being is the *raison d'etre* for determining whether a child has been abandoned by a parent or parents. A finding of abandonment under chapter 63 means, for whatever reason, the parent or parents have not provided the child with emotional and financial sustenance and, consequently, the well-being of the child requires severing the parent's legal custody or relationship with the child. Abandonment under chapter 63 is not a criminal prosecution for the purposes of punishing parents, it is a civil proceeding intended to serve the best interests of the child.[1] This recognition of the overarching importance of the child's well-being is consistent with federal case law which "has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983). *See also Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (constitutional protection of parental rights does not bar

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[1] Section 63.022(1), Florida Statutes (1985), provides: "It is the intent of the Legislature to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life." Subsequent to the district court opinion, the legislature has made its intent even more explicit by adding a new subsection 63.022(2)(*l*), Florida Statutes (1987), which states: "In all matters coming before the court pursuant to this act, the court shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person being adopted."

state from denying legitimation and granting adoption based on best interests of child).

The parties next dispute the certified question of whether an unwed father's failure to assume prebirth support responsibilities and medical expenses for an unwed natural mother who requires such assistance may constitute abandonment of the unborn child under chapter 63. Section 63.062(1) provides:

> (1) Unless consent is excused by the court, a petition to adopt a minor may be granted only if written consent has been executed after the birth of the minor by:
>
> . . . .
>
> (b) The father of the minor, if:
>
> 1. The minor was conceived or born while the father was married to the mother.
>
> 2. The minor is his child by adoption.
>
> 3. The minor has been established by court proceeding to be his child.
>
> 4. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the minor and has filed such acknowledgment with the vital statistics office of the Department of Health and Rehabilitative Services.
>
> 5. He has provided the child with support in a repetitive, customary manner.

Under section 63.072(1), the court may excuse consent of a parent who has abandoned a child. The word "abandoned" is not defined in chapter 63, but chapter 39, Florida Statutes (1985), titled *Proceedings related to juveniles*, defines abandoned as follows:

> (1) "Abandoned" means a situation in which the parent or legal custodian of a child or, in the absence

> of a parent or legal custodian, the person responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or person primarily responsible for the child's welfare to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. The failure by any such person to appear in response to actual or constructive service in a dependency proceeding shall give rise to a rebuttable presumption of such person's ability to provide for and communicate with the child.

§ 39.01(1), Fla.Stat.

The natural father here filed an acknowledgment of paternity in accordance with section 63.062(1) on 19 September 1986. Thus, his consent was required unless he had previously abandoned the child. Relying on the definition of "abandoned" in section 39.01(1), the district court concluded that the reference to communicating with the child meant, as a matter of law, there could be no abandonment of an unborn child because there could be no communication with an unborn child. While it is true that there can be no statutory abandonment under chapter 39 until the child is born, it does not follow that prebirth conduct is irrelevant to adoption proceedings. We note, first, that the definition of "abandoned" is limited by its terms to chapter 39. However, even under this chapter, communicating, or failing to communicate, with a child, while relevant to the issue of abandonment, is not dispositive: the failure to communicate does not conclusively establish abandonment and, conversely, communicating with the child does not conclusively prove a settled purpose to pro-

vide for the welfare of the child and assume all parental duties. Assuming for the moment that prebirth conduct is relevant to material facts bearing on abandonment, we see nothing in chapters 39 and 63 which precludes the courts from receiving relevant evidence of prebirth conduct by the father. The root issue then is whether prebirth conduct is *relevant* to the issue of abandonment under chapter 63. In Florida, evidence is relevant if it tends to prove or disprove a material fact and, unless prohibited by law, all relevant evidence is admissible. §§ 90.401, .402, Fla.Stat. (1985). We conclude that prebirth conduct does tend to prove or disprove material facts bearing on abandonment and may be properly introduced and used as a basis for finding abandonment under the statute.

The importance of prenatal care to the future mental and physical health of the child has long been recognized.[2] The health or well-being of the child is a continuum which extends back to the pregnancy of the mother: a child's good health does not magically begin at birth, it is powerfully affected by the nutrition and health care received by the mother during pregnancy. In establishing the Women, Infants and Children Program (WIC), for example, Congress found that substantial numbers of pregnant, postpartum, and breast-feeding women, infants, and children were at special risk with respect to physical and mental health by reason of inadequate nutrition or health care. Pub.L. No. 95-627, § 3, 92 Stat. 3603 (1978) (codified at 42 U.S.C. § 1786 (1988)); ch. 88—153, Laws of Fla. In point of fact, the WIC Program is grounded on the sound principle that the health of the mother and unborn child are integral to the health of the child after delivery. Societal norms, and chapters 39 and 63 of Florida Statutes, contemplate that the natural parents will provide for the

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[2] *Public Health Then and Now: The Origin and Development of Maternal and Child Health Programs in the United States*, 75 Am.J. of Pub. Health § 6, 590-98 (June 1985).

well-being of the child. When either or both fail to do so, the best interests of the child, and of society, require that society intercede, as in, for example, abandonment or adoption proceedings. Because prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the prebirth period. Respondent natural father's argument that he has no parental responsibility prior to birth and that his failure to provide prebirth support is irrelevant to the issue of abandonment is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible.

Prebirth conduct by an unwed father as it relates to the pregnant mother who needs the support of the father directly impacts upon the welfare of the child. The unwed pregnant mother who is unable to obtain needed support from the father is necessarily forced to take upon herself the entire responsibility for caring for the unborn child and for making necessary plans for the well-being of the child when born. The intermediary adoption program which the mother selected here is one of the options provided by the state to protect the best interests of the child, the parents, and the state. If the biological father retains an absolute veto over the decision of the abandoned pregnant mother to place the child for adoption, the mother's ability to provide for the best interests of the child and herself are nullified. Clearly this is not legislative intent.

In summary, the issue of abandonment turns on the question of whether the parent has evinced a settled purpose to assume parental duties. Providing prebirth support to the unborn child is a parental duty. Evidence of whether the parent has or has not furnished customary support to the pregnant mother is relevant to the issue of abandonment. In answer to the certified question, we hold that an unwed father's prebirth conduct in providing or failing to provide support responsibilities and medical expenses

for the natural mother is relevant to the issue of abandonment under section 63.072(1). We caution that this analysis cuts both ways. In circumstances other than those here, an unwed father would be justifiably entitled to argue that his conduct in providing prebirth support to his unborn child was relevant to his claimed right to refuse consent to the adoption of his child.

Respondent natural father also argues that even if his prebirth conduct is considered relevant to the abandonment issue, his conduct did not show that he abandoned the child or the mother. In support he cites certain minimum assistance that he gave the mother after she became pregnant. This evidence of support, along with the evidence of nonsupport, was presented to and considered by the trial court. With due deference to the fact finder who heard the evidence and observed the demeanor of the witnesses, we are satisfied that the record supports the trial judge's conclusion that the respondent natural father's efforts were marginal and did not evince a settled purpose to assume parental duties.[3]

Based on his position that section 63.072 does not permit the use of prebirth conduct in determining abandonment of the child, respondent natural father argues that denial of his right to refuse consent to the adoption is without statutory warrant. Consequently, he argues, denial of his parental rights violates the due process clause of the fourteenth amendment to the United States Constitution. We disagree. Abandonment as evidenced by pre- and postnatal conduct is the statutory basis, and warrant, for the waiver of consent by respondent natural father.

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[3] To replicate the evidence on which the trial court predicated its findings would serve no purpose other than to render conclusionary criticisms of respondent natural father's conduct. Suffice it to say that we agree with the district court that the findings of fact, a large part of which are set forth in the district court opinion, are supported by the record.

The natural father next argues that the trial court denied him equal protection under the fourteenth amendment by relying on his prebirth conduct as an unwed father when similar conduct by an unwed mother or married father could not form the basis for denial of parental rights. This argument misapprehends the nature of the issue. Unwed mothers and married fathers, indeed all parents, are subject to the loss of parental rights when they abandon their children. The issue here is whether evidence of prebirth conduct by a parent is relevant to the issue of whether the parent has abandoned the child. We hold that such evidence is relevant. Section 63.072 is neutral as to sex and marital status of the parent who has allegedly abandoned the child. The weight to be given prebirth conduct will vary from case to case depending on the conduct itself and other circumstances of the particular case, but, in as far as the particular prebirth conduct tends to prove or disprove that the parent has or has not abandoned the child at issue, such evidence is relevant and admissible regardless of the sex or marital status of the parent. Moreover, while the relationship between a parent and child is constitutionally protected, equal protection does not bar rational distinctions between parents. *Quilloin v. Walcott*, 434 U.S. 246, 254-56, 98 S.Ct. 549, 554-55, 54 L.Ed. 2d 511 (1978).

Finally, respondents argue that Florida's intermediary adoption procedure denies due process and equal protection rights because it does not give adequate notice to natural parents and does not permit them to withdraw consent, absent a showing of fraud or duress. On the issue of notice, section 63.122(4)(c) requires that notice be given to any person whose consent to the adoption is required unless that person has consented to the adoption. Respondents argue that notice should also be given to any person regardless of whether they have consented. We note, first, that under section 63.122(4)(d) any person who is seeking to withdraw consent is entitled to notice of the adoption

hearing and, further, there is no question here that both natural parents appeared and fully contested the adoption procedure. On the equal protection issue, respondent natural mother argues, as a parent in an intermediary adoption, that her consent is irrevocable under section 63.082(5), absent a showing of fraud or duress, whereas parents in an agency adoption "have the unfettered right to withdraw their 'consent' or surrender." *In re I.B.J.*, 497 So.2d 1265, 1266 (Fla. 5th DCA 1986), *review denied*, 504 So.2d 766 (Fla. 1987). Respondents' argument is misplaced for two reasons. First, the provision in section 63.082(5) that consents to adoptions may not be withdrawn, absent fraud or duress, is applicable in all adoption proceedings. Second, *In re I.B.J.* was a dependency proceeding under chapter 39, as the court made clear, not an adoption proceeding under chapter 63. To the degree that it suggests that a consent to adoption may be withdrawn at will, absent fraud or duress, we disapprove *In re I.B.J.*

Underlying and intertwined in the parties' arguments are the constitutional effects on the case at hand of *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quilloin; Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); and *Lehr*. These cases have been extensively reviewed and analyzed elsewhere[4] and are not directly on point. The decision and analysis in *Lehr*, however, does address the parental rights of an unwed biological father who does not assume the responsibilities of parenthood. Several observations of the Court are pertinent here.

> [T]he rights of the parents are a counterpart of the responsibilities they have assumed.

Lehr, 463 U.S. at 257, 103 S.Ct. at 2991.

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[4] Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L.J. 313 (1984).

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," Caban, 441 US, at 392, 60 L Ed 2d 297, 99 S Ct 1760, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection.

Id. at 261, 103 S.Ct. at 2993.

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 103 S.Ct. at 2993-94 (footnote omitted).

> The Court [in *Caban*] made it clear, however, that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclud[e] the State from withholding from him the privilege of vetoing the adoption of that child." Id., at 392, 60 L Ed 2d 297, 99 S Ct 1760.

Id. at 267, 103 S.Ct. at 2996.

It is clear from *Lehr* that the biological relationship offers the parent the opportunity to assume parental responsibilities. Parental rights based on the biological relationship are inchoate, it is the assumption of the parental responsibilities which is of constitutional significance.

> Commentators have emphasized the constitutional importance of the distinction between an inchoate and a fully developed relationship. See Comment, 46 Brooklyn L Rev 95, 115-116 (1979)("the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child"); Note, 58 Neb L Rev 610, 617 (1979)("a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights . . . will remove from him the full constitutional protection afforded the parental rights of other classes of parents"); Note, 29 Emory LJ 833, 854 (1980)("an unwed father's rights in his child do not spring solely from the biological fact of his parentage, but rather from his willingness to admit his paternity and express some tangible interest in the child"). See also Poulin, Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits, 70 Nw U L Rev 910, 916-919 (1976) (hereinafter Poulin); Developments in the Law, 93 Harv L Rev 1156, 1275-1277 (1980); Note, 18 Duquesne L Rev 375, 383-384, n 73 (1980); Note, 19 J Family L 440, 460 (1980); Note, 57 Denver LJ 671, 680-683 (1980); Note, 1979 Wash ULQ 1029, 1035; Note, 12 UCD L Rev 412, 450 n 218 (1979).

Lehr at 261 n. 17, 103 S.Ct. at 2993 n. 17. The failure to assume parental responsibility is abandonment and, under *Lehr*, is sufficient ground to deny parental rights.

For the reasons set forth above, we concluded that it was critical to the well-being of the child that the unwed father provide prebirth support to the unwed pregnant mother when such support is needed and within his means. Having determined that the welfare of the child is an element to be considered in an adoption proceeding, we

are ineluctably led to the conclusion that prebirth conduct is relevant to the issue of abandonment. In the instant case, we hold that the failure of respondent natural father to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed, vested respondent natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give consent.

In reaching the two holdings above, we rely on the relationship recognized in *Lehr* between the assumption of parental responsibilities and biological fatherhood, but our decision is reinforced by the public policy interests of society in encouraging unwed fathers to assume parental responsibilities. The failure of unwed fathers to assume parental responsibility both pre- and post-birth is a major national problem. The recently enacted Family Support Act, ~~Public Law~~ No. 100-485, 102 Stat. 2343 (1988), places major emphasis on national and state programs to establish paternity of illegitimate children and to enforce child support by unwed fathers. *See* Legislative History of Pub.L. No. 100-485, *reported in* 1988 U.S.Code Cong. & Admin. News 2776-3015. As the Congress found in enacting the WIC Program, substantial numbers of pregnant women and unborn children are placed at special risk with respect to physical and mental health by inadequate nutritional or health care. The failure of unwed fathers to provide support during pregnancy is certainly a major factor in this public problem and transfers the burden to society at large, at it did here. *Lehr*, as applied here, also represents sound public policy. Finding no constitutional or statutory provisions that would preclude the state from embracing such a policy, we answer the certified question in the affirmative, quash the district court decision below, and remand for proceedings consistent with this opinion.

It is so ordered.

EHRLICH, C.J., and OVERTON, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs specially with an opinion, in which KOGAN, J., concurs.

McDONALD, J., dissents with an opinion.

BARKETT, Justice, specially concurring.

I agree with the majority but write separately to emphasize that parents may not be stripped of parental rights lightly. Indeed, the sanctity of the parent-child relationship is a liberty interest protected under both the state and federal constitutions. *E.g., Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *In the Interest of R.W.*, 495 So.2d 133 (Fla.1986); *In the Interest of D.B.*, 385 So.2d 83 (Fla. 1980). So strong is this interest that the only civil proceeding in which a person is entitled to free public counsel in Florida is a proceeding to terminate parental rights. *R.W.;* D.B.

Obviously, however, a parent can relinquish parental rights by his or her actions. Thus, I believe that we have correctly construed and applied "abandonment" as it relates to the need for *paternal* consent under section 63.062(1), Florida Statutes. However, the precedent set by this case cannot carry over into those situations involving the prenatal responsibilities of mothers, in which substantially different factual problems and different competing rights and interests necessarily arise and must be evaluated.

KOGAN, J., concurs.

McDONALD, Justice, dissenting.

Today the Court deprives a now married couple of their natural child because the mother gave an economically duressed consent for adoption and the father, prior to the birth of the child and prior to their marriage, failed to

fully support the mother. This is done without a finding that the natural parents are unfit in the slightest. I think it a sad day.

The opinion of the Fifth District Court of Appeal in this case should be approved because its legal analysis is correct. As stated therein:

> The key issues in this case . . . are whether abandonment or desertion may be used as the sole basis to excuse the necessity for consent to an adoption under Chapter 63; and whether a putative natural father can abandon his child by neglecting his responsibilities to support the natural mother during pregnancy and assist with her pre-birth medical expenses.

In re Adoption of Doe, 524 So.2d 1037, 1043 (Fla. 5th DCA 1988). After a thorough discussion of relevant case law, the district court concluded that pre-birth acts of abandonment do not excuse consent. *Id.* at 1044. The district court majority is correct. I further add that, even if pre-birth conduct can be equated to abandonment, the conduct of the father in this case falls far short of abandonment.[1]

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[1] I will call the natural father Richard and the natural mother Mary. Even though Richard had lost his job at the end of 1985 and did not find another until May 1986, during which time he borrowed money from his father, it is unchallenged that Richard nonetheless:

(1) spent $4000 on Mary for a ski vacation, including new clothes for her;

(2) had a continuing relationship with Mary throughout the pregnancy, which included a ride to "dream" about their future the week before she left, following an evening out for her birthday;

(3) cared deeply for Mary's older son, buying him toys, taking him on outings with and without Mary, paying his insurance premiums;

(4) gave Mary a maternity gown and robe for Mother's Day in May

What the father did, or failed to do, is less than he should have. Even so, his acts fall far short of demonstrating an intent to abandon the mother and the unborn child. He did not repudiate or renounce them; he did not permanently forsake them for others or self; he did not demonstrate a continuing disinterest in their fate.

Florida has heretofore properly taken a narrow view as to what constitutes abandonment. Abandonment must be proven by clear and convincing evidence and must be complete.[2] I am aware of but two appellate decisions, both bottomed on facts much more egregious over a substantial time after birth than exist here, where abandonment was

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1986, and money for a new outfit for her birthday just days before she left;

(5) continually took Mary and her son out to eat, or to his apartment where he cooked for them, or to his parents home;

(6) provided his own furniture to furnish Mary's apartment, in addition to the furniture his parents provided at his request;

(7) paid Mary's rent in February, the only time she told him she needed financial help;

(8) never failed to pick up milk, baby food, diapers, and such when Mary asked;

(9) urged Mary to come back to Phoenix to have the child, live with him, and give him time to sort his life out;

(10) opposed the adoption and requested Mary to sign no papers.

That Richard did all of this for Mary, her older son, and the baby, after Richard knew she was pregnant and before the baby was born, is uncontradicted in the record.

[2] *In re Adoption of Noble*, 349 So.2d 1215 (Fla. 4th DCA 1977). *Accord In re Adoption of Lewis*, 340 So.2d 126 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1248 (Fla. 1977); *In re Adoption of Gossett*, 277 So.2d 832 (Fla. 1st DCA 1973).

established.[3] There are a legion of Florida cases where the courts have found that abandonment was not established.[4]

No justification exists in this case for the trial judge to excuse consent. Section 63.062, Florida Statutes (1985), requires that written consent be executed after the birth of a child. If abandonment is to take the place of or excuse consent, does it not follow that such action also take place after birth? It should.

This Court, by its decision, is wrongfully disturbing one of the most fundamental rights of human relations when it deprives the natural parents of the rights, privileges, and responsibilities of rearing their child. Such rights can be forfeited only upon a showing of unfitness or rejection by the parents. While I have grave doubts concerning the issue of whether the mother's consent was valid because of the turmoil in her life and the economic pressures exerted upon her, it is clear that adoption requires the consent of both parents. Here, the father never consented and sought to obtain the child immediately upon his birth. The adoptive parents are interlopers, albeit benign, in this case. The issue of the best interest of this child arises only when the child is legally free for adoption. § 63.022(2), Fla.Stat. (1985). Were that issue to be reached, history has demonstrated that, unless unfit, the best interest of the child lies with the natural parents. It is but a matter of time before this child will learn of his adoption and wonder why. All that can be said to him is that, even though your mother wanted you, the adoptive parents and the courts would not let her have you because in moments of despair she let you go; even though your father wanted you, the adoptive parents and the courts would not let him join your mother in having you because he did not

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[3] *Smith v. Moore*, 481 So.2d 36 (Fla. 1st DCA 1985); *Turner v. Adoption of Turner*, 352 So.2d 957 (Fla. 1st DCA 1977).

[4] *E.g.*, cases cited *supra* note 2; *Hinkle v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983), and cases cited therein.

treat your mother as well as he might have when she was pregnant with you. Even to a child these explanations are inadequate.

I would approve the decision of the district court of appeal and direct an immediate delivery of the child to the natural parents.

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 1, 1989

In the Matter of the Adoption of:
JOE DOE, Infant Baby Boy

CASE NO. 72,593
District Court of Appeal,
5th District - No. 87-1277

BOB DOE and JANE DOE,

Petitioners,

v.

RICHARD ROE and MARY ROE,

Respondents.

Upon consideration of the Motion for Rehearing and Clarification filed in the above cause by attorney for respondents, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

EHRLICH, C.J., OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

McDONALD, J., dissents

A True Copy

TEST:
SUPREME COURT OF THE STATE OF FLORIDA

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Frank Habershaw, Clerk
Hon. William D. Gorman, Clerk
Hon. Cecil H. Brown, Judge
Chandler R. Muller, Esquire
John L. O'Donnell, Jr., Esquire
Donald J. Sasser, Esquire
Cynthia L. Green, Esquire
Elaine N. Duggar, Esquire
Nancy Rainey Palmer, Esquire
Cynthia S. Swanson, Esquire
Anthony B. Marchese, Esquire
Ms. Janie Yahnke

In the Matter of the ADOPTION OF John DOE, Infant Baby Boy.

No. 87-1277.

Richard ROE and Mary Roe,

Appellants,

v.

Bob DOE and Jane Doe,

Appellees.

District Court of Appeal of Florida, Fifth District.

March 24, 1988.

Rehearing and Rehearing En Banc Denied May 19, 1988.

The Circuit Court, Orange County, Cecil H. Brown, J., entered judgment of adoption establishing parental rights to child in adoptive parents. Natural parents appealed. The District Court of Appeal, Sharp, C.J., held that: (1) natural mother was bound by her consent to adoption, absent clear and convincing evidence that consent was obtained through duress, and (2) adoption without putative father's consent could not be sustained by proof of putative father's pre-birth acts of abandonment.

Reversed; question certified.

* * *

John L. O'Donnell, Jr., of DeWolf, Ward & Morris, P.A., Orlando, for appellants.

Chandler R. Muller, of Muller, Kirkconnell and Lindsey, P.A., Winter Park, for appellees.

SHARP, Chief Judge.

The Roes, natural parents of the infant, John Doe, appeal from a judgment of adoption establishing parental rights in the Does to the child. The Roes argue that the natural mother's consent to the adoption was obtained under duress and should be invalidated. We affirm the trial court's conclusion that the natural mother is bound by her consent. However, the Roes also argue the adoption is invalid because the natural father's consent to the adoption was not obtained. The trial court found his lack of consent should be excused because of certain irresponsible actions on his part prior to the child's birth, which the trial court found constituted abandonment. We reverse.

This case was tried over a period of months. It was ably and well presented by the attorneys for both sides. As do all contested adoption cases, it caused the trial judge and the appellate panel that heard it much concern, and empathy for all of the parties involved.[1]

The transcripts of testimony in the case are lengthy, and contain conflicts regarding the natural mother's consent and the natural father's abandonment of her and the unborn child. After this adoption proceeding commenced, the natural parents married. There are numerous discrepancies between the natural mother's testimony at trial and the testimony concerning her prior statements to social workers, friends and professionals during her pregnancy with respect to the natural father abandoning her. In any event, there is evidence in this record to support the trial judge's fact findings, and we are bound as appellate judges to accept them as proven.[2]

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[1] *See In re Adoption of Cox*, 327 So.2d 776, 778 (Fla.1976); *Wylie v. Botos*, 416 So.2d 1253 (Fla. 4th DCA 1982).

[2] *Wylie v. Botos*, 416 So.2d 1253 (Fla. 4th DCA 1982).

"Factual Findings of the Court

1. The natural father and mother met in Tempe, Arizona, in the summer of 1985.

2. During the course of their later relationship, the natural mother discovered she was pregnant and advised the natural father of this fact before going on a ski vacation over the Christmas break in December of 1985.

3. At the time he was advised of the natural mother's pregnancy, the natural father had accumulated savings and, additionally, had earned commissions in the amount of $10,000 during the month of December 1985 from the sale of solar water-heating units. The natural father was also aware he would need to obtain a new job beginning in January of 1986 because the tax credits for solar equipment were being terminated by the federal government in December of 1985.

4. Knowing of the ending of his employment and being advised of the natural mother's pregnancy, the natural father expended $4,000 on equipment and ski vacation expense.

5. In January 1986 the natural father urged the natural mother to obtain an abortion because he was not ready to commit to marriage, felt financial pressure, and was troubled by the whole idea of the pregnancy."

"6. The natural mother responded by attempting to have third parties counsel the natural father against abortion.

7. During the time of her early pregnancy, the natural mother was living with a small son, born out of wedlock in another previous relationship, in an apartment in Phoenix Arizona. She told the natural father she would not abort the child in utero, but that she could not raise two children as a single, unwed mother.

8. The natural mother lost her job in January of 1986, and her economic position deteriorated as the pregnancy

continued.[3] The natural father, during the time he was urging the natural mother to abort the child, paid one month's rent for her in February 1986. Some family furniture and a microwave oven were also made available to the natural mother. No further repetitive or continual support in the form of contributions toward prenatal medical expense, care, food, rent or support was forthcoming from the natural father during the balance of the natural mother's pregnancy, which ended with the birth of a son on September 12, 1986.

9. The natural mother discussed the option of adoption with the natural father from the beginning of the pregnancy and during the entire term of the pregnancy.

10. The natural father knew from the beginning of the pregnancy that if he would not marry the natural mother, she wanted their child adopted into a loving, middle-class, Jewish home because the natural mother stated repeatedly and strongly that the child needed the stability and premanency [sic] of a loving, two-parent home. She was Jewish, and the natural father was not.

11. The natural father agreed to have the child placed for adoption, deferring to the wishes of the natural mother.[4] However, the natural father expressed that he did not want the child raised in a Jewish home.

12. In March 1986 the natural mother wrote a letter to the natural father's mother, which the natural father later discussed with his mother.

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[3] However, the record reveals that the natural mother lost her employment at a bank in February 1986, but obtained a babysitting job three weeks. She maintained this minimal employment until the end of July 1986.

[4] However, just prior to the child's birth, the natural father said he did not want the child adopted.

13. The letter explained why the natural mother would not abort the child and why the child was being placed for adoption."

"14. After the natural mother lost her job, she went on unemployment, received prenatal vitamins and free counseling from the Jewish Social Services in Phoenix, Arizona, and applied for other assistance, as well as receiving groceries from a local church.

15. The natural father was aware of the natural mother's financial situation but did not offer any financial assistance for prenatal care.

16. The natural mother told her physician, mother, sister, and friend who tried to previously counsel the natural father against aborting the child, that she was going to Florida to start her life over and place the child with a Jewish family.

17. The natural mother's mother, a resident of Tampa, Florida, contacted a local rabbi and said her daughter was pregnant and that her daughter wanted her child placed with a Jewish family.

18. The prospective adoptive parents, a middle-class, Jewish couple, residents of central Florida, husband age 36, wife age 34, have been married since 1975, and have tried to conceive a child with no success.

19. The prospective adoptive parents have placed their names with several sources of adoption and heard through friends that there was a Jewish baby available, through the source of the Tampa rabbi previously contacted by the natural mother's mother.

20. An attorney whom the prospective adoptive parents had contacted as a source of adoption was then in contact with the natural mother's mother, who then had the attorney call the natural mother in Arizona.

21. In a long-distance telephone call lasting over one and one-half hours, the attorney questioned the natural mother at length about her motivation for placing the child for adoption.

22. The natural mother told the attorney that the natural father had washed his hands of her and the child and had not given needed prenatal financial and emotional support; that she did not love the natural father, and that it was best for her child to be placed with a two-parent home for adoption, because the natural mother was already raising one child on her own as a single parent and she could not afford, emotionally or financially, to raise two. She was happy to learn that the attorney was in contact with a Jewish couple fitting her criteria for adoption.

23. The natural mother left Phoenix without telling the natural father. He was given a letter by the natural mother's sister explaining why she left."

"24. Within a matter of days, the natural mother called the natural father and told him she was in Florida.[5] She then reiterated that she was placing the child for adoption because the natural father would not marry her; she could not support two children on her own, and the child would be better off in a two-parent home.

25. The natural mother and natural father were in telephonic contact up until just before the birth of the child.

26. The subject of the phone conversations primarily dealt with the relationship of the natural mother and natural father, with the natural father urging the natural mother to come to Phoenix to have the child, live with him and give him time to sort his life out and make the ultimate decision of marriage.

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[5] The record reveals, however, that the natural mother did not advise him of her Florida address or telephone number.

27. The natural mother told the natural father she would not live with him out of a marriage relationship and repeatedly told him why placing the child up for adoption was best for all.

28. The natural father had an insurance coupon book sent to the natural mother with a letter enclosed dated August 18, 1986. The natural mother dropped a copy of the letter by the intermediary attorney's office.

29. The letter discussed the relationship of the natural parents and also asked the mother to "at least think about" letting the natural father raise the child.

30. The attorneys concluded, based upon the lack of prenatal financial or emotional support given by the unwed father, that the natural father's consent fit the criteria for excusal by the Court under Florida's adoption statute. They did not contact the natural father or the prospective adoptive parents about the letter.

31. After sending the letter, the natural father and natural mother were in contact again by telephone. In the last telephonic contact before the birth of the child, the natural mother, after having heard within a short one- to two-week period the natural father say he would marry her and then say he had changed his mind and could not decide upon marriage, asked the natural father to let her make the decision. He did not say no.[6]

32. The natural mother, during the two weeks before the birth of the child, was wrestling with whether to place her child for adoption or to keep the child. She counseled with a Roman Catholic nun employed as a social worker with an Orlando, Florida center for unwed mothers, BETA House. She spoke with her mother and sister.

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[6] However, the record reveals that in their last conversation before the child's birth, the natural father told the natural mother not to "sign any papers," and she agreed she would not do so.

33. Concluding that the natural father was staying with his original position of wanting her to keep seeing him but not making a commitment to marriage and not receiving any support emotionally or financially or any offers of prenatal financial support, the natural mother contacted her physicians and asked them to induce labor.

34. In the hospital the natural mother cried and expressed concern over placing her baby for adoption, but on Sunday, September 14, 1986, two days after the birth of the child on Friday, September 12, 1986, the natural mother told the attending postpartum nurse she was sure she wanted the child placed for adoption. She had previously consented to medication to dry up her breast milk, and she told the nurse at 8:30 a.m., forty-five minutes before signing the consent, to take the child back to the nursery, that she did not want to see him anymore.

35. At 9:15 a.m. the natural mother signed the required consent, later stating she knew what she was signing, although she did not like it.

36. The natural mother called an exgirlfriend of the natural father's on Monday, September 15, 1986, telling her of the birth of the child.

37. The natural father was called by the exgirlfriend and he then called the natural mother saying to get the child back and that he would marry her.[7]"

In addition, the trial court found that the adoption was clearly in the best interest of this child, although it earlier disclaimed this as a consideration in determining the consent issues. We agree with the appellants that the best interest of the child is not a relevant factor unless the

[7] The natural father also immediately called the intermediary handling the adoption to tell him he wanted his child and flew to Orlando with baby clothes.

child was legally available to be adopted.[8] However, the adoptive parents have had custody of the child since its birth, and it is now over one year old. The record supports the trial court's finding that there may possibly be serious psychological damage at this point to the child, upon being removed from the only home it has ever known.

Validity of the Natural Mother's Consent

The trial court found that the natural mother failed to show by clear and convincing evidence that her consent was not freely and voluntarily given.

> The natural mother was intelligent, articulate, and knew the consequences of signing the consent for adoption—a form the intermediary attorney had discussed with her two months before the birth of her child and that the HRS worker had reviewed with her in a meeting before having her physician induce labor. While surrender of a baby for adoption is upsetting to a natural mother, this is universal and not grounds for supporting duress.

[1] The trial court found the natural mother gave up the baby because of generalized social and financial pressures, but that no one exerted coercion, duress or fraud to procure her consent. Absent a finding of fraud, duress, or undue influence, a natural parent's consent to an adoption is valid and irrevocable upon execution of the written

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[8] The best interests of the child cannot be considered in a contest between natural parents and third parties, absent a finding of abandonment, that the parent is disabled from exercising custody, or that custody in the natural parent would otherwise be detrimental to the the child. *In re Adoption of Baby Girl C.*, 511 So.2d 345 (Fla. 2d DCA 1987); *In re Guardianship of D.A. McW.*, 460 So.2d 368 (Fla.1984); *Hinkle v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983); *In re Adoption of Cox*, 327 So.2d 776 (Fla.1976).

consent.[9] This same rule exists in most other jurisdictions in an effort to balance the welfare and rights of the child and both sets of parents involved in an adoption.[10] If consents to adoption were freely made voidable, the stability of adoptive families and the institution of adoption itself would be threatened.

Necessity for Natural Father's Consent to the Adoption

Pursuant to Florida's current statute governing adoptions (Chapter 63), the natural father's consent to this adoption was required.[11] Section 63.062(1)(b) provides that the natural father must give his written consent following the birth of the child, if he has filed an affidavit of paternity with the vital statistics office of the Department of Health and Rehabilitative Services.[12] The natural father filed such an acknowledgment in Florida, shortly after the birth of the child and before this adoption proceeding commenced.

However, the adoption statute also provides that such consent to an adoption may be excused by the court.[13] Section 63.072(1) specifies that consent is excusable in the case of "a parent who has deserted a child without af-

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[9] § 63.082(5), Fla.Stat. (1985); *In re Adoption of Cox*, 327 So.2d 776 (Fla.1976); *Grabovetz v. Sachs*, 262 So.2d 703 (Fla. 3rd DCA), *cert. denied*, 267 So.2d 329 (Fla.1972); *compare In re Adoption of Baby Girl C.*, 511 So.2d 345 (Fla. 2d DCA 1987); *In re Adoption of P.R. McD.*, 440 So.2d 57 (Fla. 4th DCA 1983).

[10] *See Petition of Steve B.D.*, 112 Idaho 22, 730 P.2d 942 (Idaho 1986); *In re Adoption of Child by P.*, 114 N.J.Super. 584, 277 A.2d 566 (A.D. 1971); *In re G.K.D.*, 332 S.W.2d 62 (Mo.App. 1960).

[11] *Guerra v. Doe*, 454 So.2d 1 (Fla. 3rd DCA 1984), *review denied*, 462 So.2d 1106 (Fla.1985).

[12] The natural father's written consent is also required in other circumstances not relevant to this case.

[13] § 63.062(1), Fla.Stat. (1985).

fording means of identification, or who has abandoned a child."

The trial court in this case found that the natural father's consent was excused because of estoppel (*i.e.*, he had impliedly consented to the adoption prior to the birth of the child) and he had abandoned the child by his actions and failures to act with respect to the natural mother, prior to its birth:

> 41. The natural father is estopped to claim his written consent is required under Florida law because his actions and communications to the natural mother and third parties show that he impliedly consented to the adoption. *Wylie v. Botos*, 416 So.2d 1253 (Fla. 4th DCA 1984).[14]
>
> 42. When the natural father learned the natural mother was pregnant, he initially attempted to have the pregnancy terminated, later agreed to the child being placed for adoption, and then did nothing showing continual and repetitive prenatal support. *Fla.Stat.* § 63.062(1)(b)(5) (1985); *Wylie v. Botos, supra; In re Adoption of Mullenix,* 359 So.2d 65 (Fla. 1st DCA 1978).
>
> 43. On notice that the natural mother could not raise two children on her own because of her difficulties raising one child out of wedlock, the natural father paid no monies toward prenatal medical bills, food, or medications, and only one month's rent. As such, there was a shirking of the responsibilities cast by law and nature. *Hinkle v. Lindsey,* 424 So.2d 983 (Fla. 5th DCA 1983); *Wylie v. Botos, supra; Fla.Stat.* § 63.062(1)(b)(5) (1985).
>
> 44. The Court notes that *Wylie v. Botos, supra,* has remarkably similar facts wherein the unwed father

[14] Correct year is 1982.

first ignored the fact of pregnancy, then gave initial assent to "her decision" to adopt the baby out. Shortly after the birth of the child, the unwed father and mother reconciled, decided to contest the adoption on the basis of no written consent executed by the putative father, and subsequently married. The adoption petition was granted notwithstanding the natural father's objection and lack of written consent on the basis that the father's pre-birth actions evidenced consent and that he was equitably estopped to claim his written consent was required.

45. In light of the fact that this newborn child was placed up for adoption by the natural mother because the unwed father had been unwilling to show meaningful support during the pregnancy, the Court considers his pre-birth conduct to be relevant to the issue of whether he gave consent, implied or otherwise, to the adoption, and is now estopped to claim his written consent is required.

* * * * * * *

49. The Court finds, by clear and convincing evidence, that the natural father abandoned the developing child by failing to provide the unwed mother with meaningful, repetitive, and customary support either during the pregnancy or at any point before the unwed mother executed the consent two days following the child's birth. *Wylie v. Botos, supra.*

50. During this critical time frame, the natural father's conduct evinced a "settled purpose" to shed himself of the responsibility presented by pregnancy. To this end he was intent upon placing his "freedom" and desires above the needs of the child developing in the natural mother's womb. Additionally, he withheld [sic] emotional and financial support that was within his ability to give when the mother lost her job and was incurring prenatal and other expenses

> that were beyond her ability to pay. This Court listened with rapt concentration to the natural mother about this agonizing period; how she defended her position against the Father's urging that she permit her unborn child to be destroyed by abortion; how she squeezed by economically, accepting welfare and the charity of others, and how in the early days of August in her 8th or 9th month of pregnancy she sought so desperately with the help of her family to replace her medical, health, and economic uncertainty and anxieties with security and direction when she finally chose the course of adoption for her unborn child and moved back to Florida. Historically, an equity Court has been concerned with unclean hands.

The key issues in this case, which are so far as we can determine ones of first impression, are whether abandonment or desertion may be used as the sole basis to excuse the necessity for consent to an adoption under Chapter 63; and whether a putative natural father can abandon his child by neglecting his responsibilities to support the natural mother during pregnancy and assist with her prebirth medical expenses.

Adoption is a statutory creation, not existent at common law, and courts generally require strict compliance with the statute.[15] Under current adoption statutes, the trend is to give unmarried natural fathers substantive and procedural rights analogous to married fathers and natural mothers,[16] although because of the psychological and biological differences between begetting and bearing a child, no court has held that an unmarried father's rights must be equal to the natural mother's or even to a married

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[15] 2 Am.Jur.2d *Adoption* §§ 2, 3, 6; *see In re Palmer's Adoption*, 129 Fla. 630, 176 So. 537 (1937).

[16] *See In re Guardianship of D.A. McW.*, 429 So.2d 699 (Fla. 4th DCA 1983) *approved*, 460 So.2d 368 (Fla.1984).

father's. *See Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *In re Adoption of Mullenix,* 359 So.2d 65 (Fla. 1st DCA 1978); *Department of HRS v. Herzog,* 317 So.2d 865 (Fla. 2d DCA 1975).

The closest case factually to this one that we have discovered is *Wylie v. Botos,* 416 So.2d 1253 (Fla. 4th DCA 1982). In *Wylie,* the unmarried natural father expressly agreed with the mother's decision to have the unborn child adopted. In contrast to this case, he helped support the mother and paid medical expenses with the understanding he would be reimbursed by the adoptive parents. Not until after the child was born, the consent executed by the mother, and a petition to adopt had been filed did the natural father file his acknowledgment of paternity (some two months after the child's birth). The Fourth District Court of Appeal held that the natural father was estopped to claim his consent was necessary under section 63.062(1). In this case, however, the natural father timely filed his acknowledgment of paternity, which triggered the necessity for his consent under the adoption statute.

[2] In other contexts the Florida courts have required clear and convincing proof of abandonment by a parent in order to terminate his or her parental rights.[17] Proof of abandonment may be by any word, deed or course of action, from which a settled purpose to abandon can be inferred.[18] But we can find to Florida case which has based a finding of abandonment on pre-birth, laggard activity by a putative father. Other jurisdictions which have considered this issue have reached different conclusions. *See In re Adoption of Nelson,* 202 Kan. 663, 451 P.2d 173 (1969)

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[17] *See Webb v. Blancett,* 473 So.2d 1376 (Fla. 5th DCA 1985); *Hinkle v. Lindsey,* 424 So.2d 983 (Fla. 5th DCA 1983); *In re Adoption of Braithwaite,* 409 So.2d 1178 (Fla. 5th DCA 1982).

[18] *Webb,* supra.; *see Turner v. Adoption of Turner,* 352 So.2d 957 (Fla. 1st DCA 1977).

(rejected view that a natural father can abandon an unborn child); *Doe v. Attorney W.*, 410 So.2d 1312 (Miss.1982) (upheld termination of parental rights on grounds the father abandoned his unborn child); *State v. ex rel. Lewis v. Lutheran So. Ser.*, 68 Wisc.2d 36, 227 N.W.2d 643 (1975) (upheld termination of natural father's parental rights because of pre-birth abandonment).

[3] The only statutory definition of "abandonment" in Florida is that found in section 39.01(1), Florida Statutes (1985):

> (1) "Abandoned" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the person responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or person primarily responsible for the child's welfare to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. The failure by any such person to appear in response to actual or constructive service in a dependency proceeding shall give rise to a rebuttal presumption of such person's ability to provide for and communicate with the child.

As we read the above definition, the reference to a child contemplates one that has been born. How could one be expected to communicate with an unborn child? We therefore conclude this adoption cannot be sustained by proof of pre-birth acts of abandonment.

However, we recognize that there is no clear legislative or case law authority on the issue of pre-birth abandonment in Florida. We certify that this is a question of great

public importance,[19] due to its impact on Florida's adoption statute and procedures. We therefore certify the following question to the Florida Supreme Court:

> CAN THE FAILURE OF A PUTATIVE UNMARRIED FATHER TO ASSUME SUPPORT RESPONSIBILITIES AND MEDICAL EXPENSES FOR THE NATURAL MOTHER WHEN SHE REQUIRES SUCH ASSISTANCE AND HE IS AWARE OF HER NEEDS, BE A BASIS FOR A TRIAL COURT TO EXCUSE HIS CONSENT TO THE ADOPTION OF THE CHILD, ON THE GROUNDS OF ABANDONMENT OR ESTOPPEL, PURSUANT TO SECTION 63.072(1), FLORIDA STATUTES (1985).

Accordingly, we reverse the judgment of adoption in this case and certify the above question as one needing clarification by our State Supreme Court. To preserve the status quo in this situation, our mandate shall be stayed pending the acceptance or denial of jurisdiction by the supreme court in this case, and its ultimate disposition of this cause. Pending final resolution of the case, we direct that the trial court shall have jurisdiction to establish visitation rights for the natural parents.

REVERSED; QUESTION CERTIFIED.

COBB and COWART, JJ., concur.

ON MOTION FOR REHEARING AND REHEARING EN BANC

PER CURIAM.

DENIED.

SHARP, W., C.J., COBB, COWART and DANIEL, JJ., concur.

DAUKSCH, J., dissents with opinion.

ORFINGER, J., did not participate.

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[19] Fla.R.App.P. 9.030(a)(2)(B)(i).

DAUKSCH, J., dissenting.

I respectfully dissent.

In my opinion we should decide this case en banc. This is a case of exceptional importance and warrants exceptional treatment.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI86-13653

IN THE MATTER OF THE ADOPTION OF:

JOHN DOE, Infant Baby Boy.

FINAL JUDGMENT OF ADOPTION

THIS CAUSE came before the Court for a trial beginning on Tuesday, May 19, 1987, through Thursday, May 21, 1987, upon a Petition for Adoption and Response thereto, and the Court having considered testimony and documentary evidence presented by the parties, having heard argument of counsel, and being otherwise duly advised in the premises, finds as follows:

FACTUAL FINDINGS OF THE COURT

1. The natural father and natural mother met in Tempe, Arizona, in the summer of 1985.

2. During the course of their later relationship, the natural mother discovered she was pregnant and advised the natural father of this fact before going on a ski vacation over the Christmas break in December of 1985.

3. At the time he was advised of the natural mother's pregnancy, the natural father had accumulated savings and, additionally, had earned commissions in the amount of $10,000 during the month of December 1985 from the sale of solar water-heating units. The natural father was also aware he would need to obtain a new job beginning in January of 1986 because the tax credits for solar equipment were being terminated by the federal government in December of 1985.

4. Knowing of the ending of his employment and being advised of the natural mother's pregnancy, the natural father expended $4,000 on equipment and ski vacation expense.

5. In January 1986 the natural father urged the natural mother to obtain an abortion because he was not ready to commit to marriage, felt financial pressure, and was troubled by the whole idea of the pregnancy.

6. The natural mother responded by attempting to have third parties counsel the natural father against abortion.

7. During the time of her early pregnancy, the natural mother was living with a small son, born out of wedlock in another previous relationship, in an apartment in Phoenix, Arizona. She told the natural father she would not abort the child in utero, but that she could not raise two children as a single, unwed mother.

8. The natural mother lost her job in January of 1986, and her economic position deteriorated as the pregnancy continued. The natural father, during the time he was urging the natural mother to abort the child, paid one month's rent for her in February 1986. Some family furniture and a microwave oven were also made available to the natural mother. No further repetitive or continual support in the form of contributions toward prenatal medical expense, care, food, rent or support was forthcoming from the natural father during the balance of the natural mother's pregnancy, which ended with the birth of a son on September 12, 1986.

9. The natural mother discussed the option of adoption with the natural father from the beginning of the pregnancy and during the entire term of the pregnancy.

10. The natural father knew from the beginning of the pregnancy that if he would not marry the natural mother, she wanted their child adopted into a loving, middle-class, Jewish home because the natural mother stated repeatedly

and strongly that the child needed the stability and premanency of a loving, two-parent home. She was Jewish, and the natural father was not.

11. The natural father agreed to have the child placed for adoption, deferring to the wishes of the natural mother. However, the natural father expressed that he did not want the child raised in a Jewish home.

12. In March 1986 the natural mother wrote a letter to the natural father's mother, which the natural father later discussed with his mother.

13. The letter explained why the natural mother would not abort the child and why the child was being placed for adoption.

14. After the natural mother lost her job, she went on unemployment, received prenatal vitamins and free counseling from the Jewish Social Services in Phoenix, Arizona, and applied for other assistance, as well as receiving groceries from a local church.

15. The natural father was aware of the natural mother's financial situation but did not offer any financial assistance for prenatal care.

16. The natural mother told her physician, mother, sister, and friend who tried to previously counsel the natural father against aborting the child, that she was going to Florida to start her life over and place the child with a Jewish family.

17. The natural mother's mother, a resident of Tampa, Florida, contacted a local rabbi and said her daughter was pregnant and that her daughter wanted her child placed with a Jewish family.

18. The prospective adoptive parents, a middle-class, Jewish couple, residents of central Florida, husband age 36, wife age 34, have been married since 1975, and have tried to conceive a child with no success.

19. The prospective adoptive parents have placed their names with several sources of adoption and heard through friends that there was a Jewish baby available, through the source of the Tampa rabbi previously contacted by the natural mother's mother.

20. An attorney whom the prospective adoptive parents had contacted as a source of adoption was then in contact with the natural mother's mother, who then had the attorney call the natural mother in Arizona.

21. In a long-distance telephone call lasting over one and one-half hours, the attorney questioned the natural mother at length about her motivation for placing the child for adoption.

22. The natural mother told the attorney that the natural father had washed his hands of her and the child and had not given needed prenatal financial and emotional support; that she did not love the natural father, and that it was best for her child to be placed with a two-parent home for adoption, because the natural mother was already raising one child on her own as a single parent and she could not afford, emotionally or financially, to raise two. She was happy to learn that the attorney was in contact with a Jewish couple fitting her criteria for adoption.

23. The natural mother left Phoenix without telling the natural father. He was given a letter by the natural mother's sister explaining why she left.

24. Within a matter of days, the natural mother called the natural father and told him she was in Florida. She then reiterated that she was placing the child for adoption because the natural father would not marry her; she could not support two children on her own, and the child would be better off in a two-parent home.

25. The natural mother and natural father were in telephonic contact up until just before the birth of the child.

26. The subject of the phone conversations primarily dealt with the relationship of the natural mother and natural father, with the natural father urging the natural mother to come to Phoenix to have the child, live with him and give him time to sort his life out and make the ultimate decision of marriage.

27. The natural mother told the natural father she would not live with him out of a marriage relationship and repeatedly told him why placing the child up for adoption was best for all.

28. The natural father had an insurance coupon book sent to the natural mother with a letter enclosed dated August 18, 1986. The natural mother dropped a copy of the letter by the intermediary attorney's office.

29. The letter discussed the relationship of the natural parents and also asked the mother to "at least think about" letting the natural father raise the child.

30. The attorneys concluded, based upon the lack of prenatal financial or emotional support given by the unwed father, that the natural father's consent fit the criteria for excusal by the Court under Florida's adoption statute. They did not contact the natural father or the prospective adoptive parents about the letter.

31. After sending the letter, the natural father and natural mother were in contact again by telephone. In the last telephonic contact before the birth of the child, the natural mother, after having heard within a short one- to two-week period the natural father say he would marry her and then say he had changed his mind and could not decide upon marriage, asked the natural father to let her make the decision. He did not say no.

32. The natural mother, during the two weeks before the birth of the child, was wrestling with whether to place her child for adoption or to keep the child. She counseled with a Roman Catholic nun employed as a social worker

with an Orlando, Florida center for unwed mothers, BETA House. She spoke with her mother and sister.

33. Concluding that the natural father was staying with his original position of wanting her to keep seeing him but not making a commitment to marriage and not receiving any support emotionally or financially or any offers of prenatal financial support, the natural mother contacted her physicians and asked them to induce labor.

34. In the hospital the natural mother cried and expressed concern over placing her baby for adoption, but on Sunday, September 14, 1986, two days after the birth of the child on Friday, September 12, 1986, the natural mother told the attending postpartum nurse she was sure she wanted the child placed for adoption. She had previously consented to medication to dry up her breast milk, and she told the nurse at 8:30 a.m., forty-five minutes before signing the consent, to take the child back to the nursery, that she did not want to see him anymore.

35. At 9:15 a.m. the natural mother signed the required consent, later stating she knew what she was signing, although she did not like it.

36. The natural mother called an ex-girlfriend of the natural father's on Monday, September 15, 1986, telling her of the birth of the child.

37. The natural father was called by the ex-girlfriend and he then called the natural mother saying to get the child back and that he would marry her.

CONCLUSIONS OF LAW

The parties have raised several issues. The Petitioners contend that the natural mother's written consent to the adoption is valid and cannot be withdrawn absent evidence of fraud or duress; that the natural father gave implied consent to the adoption prior to the child's birth; that he

is now equitably estopped to claim his written consent is required; that his lack of consent should be excused because he abandoned the child as it developed within the womb of the unwed mother; and the child's best interest would be served by granting the adoption.

The Respondents' position is that the mother's consent was obtained by duress; that the father's consent is required and has not been given; and that the mother is constitutionally entitled to withdraw her consent until a judgment is entered terminating her parental rights.

38. The Court has jurisdiction of the subject matter and of the parties.

A. Duress in Mother's Consent

39. The natural mother has not shown by clear and convincing evidence that her consent was not freely and voluntarily given. The natural mother was intelligent, articulate, and knew the consequences of signing the consent for adoption - a form the intermediary attorney had discussed with her two months before the birth of her child and that the HRS worker had reviewed with her in a meeting before having her physician induce labor. While surrender of a baby for adoption is upsetting to a natural mother, this is universal and not grounds for supporting duress. *See, In re Adoption of Cox*, 327 So. 2d 776 (Fla. 1976); *Pugh v. Barwick*, 56 So. 2d 124 (Fla. 1952); *Graboretz v. Sachs*, 262 So. 2d 703 (Fla. 3d DCA), *cert. den.* 267 So. 2d 329 (Fla. 1972); *Chartier v. John Doe*, 11 Fla. Supp. 2d 818 (Fla. 16th Cir., May 13, 1985). *See also, In re Surrender of Minor Children*, 344 Mass. 230, 181 N.E.2d 836, 839 (1962); *People ex rel Drury v. Catholic Home Bureau*, 34 Ill. 2d 84, 213 N.E.2d 507 (1966). Likewise, here, there was no evidence that the natural mother was economically coerced by her family or the intermediaries. The surrender of a baby for adoption is caused in the usual instance by some social and financial pressures on the natural mother. Indeed, it would be a rare adoption

where this is not the case. *See, In re Surrender of Minor Children, supra* at 839; *People ex rel Drury v. Catholic Home Bureau, supra* at 512; *Chartier v. John Doe, supra* at 18. However, the natural mother here deliberately signed a consent, unambiguous in form, after having weighed and discussed the other factors leading to her ultimate decision. The Court concludes that there was no legal duress on the mother to sign the consent.

B. Withdrawal of Consent by Natural Mother

40. The Court finds that the natural mother has not been denied equal protection by the application of Section 63.082(5), thus rendering her consent irrevocable in this intermediary adoption, absent a showing of fraud or duress. The Court specifically holds that Section 63.082(5), Florida Statutes (1985), is constitutional. Adoptive parents in a dependency proceeding under Chapter 39, Florida Statutes, are not similarly situated to adoptive parents in a private or intermediary adoption proceeding, since in the latter instance the third-party adoptive parents' rights are triggered immediately by the signing of the consent and the child is directly placed in the home of the prospective adoptive parents. *In Interest of I.B.J.*, 497 So. 2d 1265 (Fla. 5th DCA 1986).

C. Implied Consent of the Father and Equitable Estoppel

41. The natural father is estopped to claim his written consent is required under Florida law because his actions and communications to the natural mother and third parties show that he impliedly consented to the adoption. *Wylie v. Botos*, 416 So. 2d 1253 (Fla. 4th DCA 1984).

42. When the natural father learned the natural mother was pregnant, he initially attempted to have the pregnancy terminated, later agreed to the child being placed for adoption, and then did nothing showing continual and repetitive prenatal support. FLA. STAT. § 63.062(1)(b)(5) (1985); *Wylie*

v. Botos, supra; In re Adoption of Mullenix, 359 So. 2d 65 (Fla. 1st DCA 1978).

43. On notice that the natural mother could not raise two children on her own because of her difficulties raising one child out of wedlock, the natural father paid no monies toward prenatal medical bills, food, or medications, and only one month's rent. As such, there was a shirking of the responsibilities cast by law and nature. *Hinkle v. Lindsey*, 424 So. 2d 983 (Fla. 5th DCA 1983); *Wylie v. Botos, supra*; FLA. STAT. § 63.062(1)(b)(5) (1985).

44. The Court notes that *Wylie v. Botos, supra*, has remarkably similar facts wherein the unwed father first ignored the fact of pregnancy, then gave initial assent to "her decision" to adopt the baby out. Shortly after the birth of the child, the unwed father and mother reconciled, decided to contest the adoption on the basis of no written consent executed by the putative father, and subsequently married. The adoption petition was granted notwithstanding the natural father's objection and lack of written consent on the basis that the father's pre-birth actions evidenced consent and that he was equitably estopped to claim his written consent was required.

45. In light of the fact that this newborn child was placed up for adoption by the natural mother because the unwed father had been unwilling to show meaningful support during the pregnancy, the Court considers his pre-birth conduct to be relevant to the issue of whether he gave consent, implied or otherwise, to the adoption, and is now estopped to claim his written consent is required.

46. Based on the Florida Legislature's intent, as expressed in the Senate Judiciary hearing which took place in April of 1975 on Senate Bill 41; the permissive language of Section 63.072, "The court may excuse"; and *Guerra v. Doe*, 454 So. 2d 1 (Fla. 3d DCA 1984), this Court has the inherent power, under these facts, to grant the adoption of the child (over the putative father's objection) when

adoption would be in the child's best interest and welfare. To conclude otherwise would provide a putative father, whose consent is required, with absolute and arbitrary veto power over an adoption proceeding without regard to the child's needs and welfare.

D. Abandonment by the Father

47. While the natural father is a person from whom a consent is required under Section 63.062(1)(b)(4), Florida Statutes (1985), because he executed a certificate and filed it with the Bureau of Vital Statistics, his consent may be excused by the Court if he has abandoned the child. "Abandonment" in this context means "conduct which manifests a settled purpose to premanently forego all parental rights and the shirking of the responsibilities case by law and nature so as to relinquish all parental claims to the child." *Hinkle v. Lindsey, supra* at 985.

48. Since the case *sub judice* has as its subject matter the contested adoption of a newborn, it necessarily follows that the putative father's opportunity to establish a pattern of conduct toward the child focuses on his conduct throughout the pregnancy term.

49. The Court finds, by clear and convincing evidence, that the natural father abandoned the developing child by failing to provide the unwed mother with meaningful, repetitive, and customary support either during the pregnancy or at any point before the unwed mother executed the consent two days following the child's birth. *Wylie v. Botos, supra.*

50. During this critical time frame, the natural father's conduct evinced a "settled purpose" to shed himself of the responsibility presented by pregnancy. To this end he was intent upon placing his "freedom" and desires above the needs of the child developing in the natural mother's womb. Additionally, he witheld emotional and financial support that was within his ability to give when the mother lost

her job and was incurring prenatal and other expenses that were beyond her ability to pay. This Court listened with rapt concentration to the natural mother about this agonizing period; how she defended her position against the Father's urging that she permit her unborn child to be destroyed by abortion; how she squeezed by economically, accepting welfare and the charity of others, and how in the early days of August in her 8th or 9th month of pregnancy she sought so desperately with the help of her family to replace her medical, health, and economic uncertainty and anxieties with security and direction when she finally chose the course of adoption for her unborn child and moved back to Florida. Historically, an equity Court has been concerned with unclean hands.

BEST INTEREST OF THE CHILD

51. The Court has not discussed the best interest of the child, nor has it considered it in reaching its decision, nor does it rely upon it in making its determination in this cause. Based upon the evidence and the applicable law which has been discussed heretofore, the Court believes that the natural mother has not shown by clear and convincing evidence that her consent was obtained by fraud or coercion. Likewise, the prospective adoptive parents have shown by clear and convincing evidence that the natural father impliedly consented to the adoption, is now estopped to claim that he did not consent to the adoption, and, furthermore, that he abandoned the child as it developed in the womb. The reason the Court has not considered the best interest of the child is because the Court is not certain that Florida law sets forth whether or not the Court may consider this in circumstances such as these. It is unclear whether or not in the face of allegations of fraud, duress and the like, the Court is able to reach the best interest of the child in making its determination. The Court would be remiss, however, if it did not discuss this

matter for the benefit of the district court of appeal should that court feel it is a proper factor.

If the best interest of the child is considered to be a relevant factor, it is clear that the child should remain where he is. George Lindenfeld, Ph.D., testified at length regarding the bonding which has occurred between the minor child and the prospective adoptive parents and indicated that serious psychological damage to the child could occur because of the stage in which the child is in its development. Furthermore, Dr. Lindenfeld testified that as time goes on, the damage would become more severe.

The natural parents did not contest the suitability of the prospective adoptive parents' home as far as a good home and having good parents raise the minor child.

Jan Yahnke, who testified on behalf of the Florida Department of Health and Rehabilitative Services, indicated that but for the legal issues involved concerning the question of the natural parents' consent, she would have recommended placement of the child with the prospective adoptive parents.

It is clear that the bonding process which has been going on during the first fragile months of this child's life is vital to the healthy emotional development of the little boy. This question of bonding creates an overriding interest in keeping the child where it is in the absence of the clearest and most compelling reasons:

> This viewpoint was summed up by our own Supreme Court in the case of *In Re Adoption by Cox*, 327 So. 2d 776 (Fla. 1976), in which the Court stated "[i]n this case the record reveals that the trial judge found that the child's best interest would be served by allowing the child to remain with persons she had known her entire (albeit short) life. In such circumstances we will not say that the natural mother's recantation of

> consent, or her fitness and desires, must prevail over the trial court's judgment to the contrary". *Id.* at 778. This viewpoint was also put forth by the Court of Appeals in Arizona in *In Re Adoption of Hammer*, 15 Ariz. App. 196, 487 P.2d 417 (1971); "[F]rom a strictly humanitarian standpoint there must be an end to the emotional stress and strain that is involved in the natural parents' attempt to regain custody of their child. Ths strain is particularly acute to the adoptive child itself, who may have established strong bonds of affection and love for the adoptive parents, and to the adoptive parents who must suffer the spectre of losing their child." 487 P.2d at 419.

Chartier v. John Doe, supra at 21.

IT IS FURTHER THE FINDING OF THE COURT:

That the Petitioners are fit and proper persons to adopt the minor child sought to be adopted;

That the child is suitable for adoption by the Petitioners, and all the fees paid by the Petitioners are proper and reasonable; it is, therefore,

ORDERED AND ADJUDGED:

That the minor child involved herein is declared to be the legal child of the Petitioners and is given the name of [John Doe], by which said child shall hereafter be known, and it is

FURTHER ORDERED AND ADJUDGED:

That this child shall be the child and legal heir of the Petitioners, entitled to all rights and privileges and subject to all the obligations of the child born to the Petitioners in lawful wedlock.

ORDERED AND ADJUDGED in Chambers at Orlando, Orange County, Florida, this 22nd day of June, 1987.

/s/ Cecil H. Brown
CIRCUIT JUDGE CECIL H. BROWN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Judgment of Adoption has been furnished by U.S. Mail this 22 day of June, 1987, to: CHANDLER R. MULLER, ESQ., Post Office Box 2728, Winter Park, Florida 32790; JOHN L. O'DONNELL, ESQ., Suite 1475, Hartford Building, 201 East Robinson Street, Orlando, Florida 32801; and ANTHONY B. MARCHESE, ESQ., Suite 431, Westshore Place, 4350 West Cypress, Tampa, Florida 33607.

/s/ Mary Holland
Secretary

CHAPTER 63

ADOPTION

63.012 Short title.—This chapter shall be known as the "Florida Adoption Act."

63.022 Legislative intent.—

(1) It is the intent of the Legislature to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life.

(2) The basic safeguards intended to be provided by this act are that:

(a) The child is legally free for adoption;

(b) The required persons consent to the adoption or the parent-child relationship is terminated by judgment of the court;

(c) The required social studies are completed and the court considers the reports of these studies prior to judgment on adoption petitions;

(d) All placements of minors for adoption are reported to the Department of Health and Rehabilitative Services;

(e) A sufficient period of time elapses during which the child has lived within the proposed adoptive home under the guidance of the department or a licensed child-placing agency;

(f) All expenditures by intermediaries placing, and persons independently adopting, a minor are reported to the court and become a permanent record in the file of the adoption proceedings;

(g) Social and medical information concerning the child and the natural parents is furnished by the natural parent when available and filed with the consent to the adoption when a minor is placed by an intermediary;

(h) A new birth certificate is issued after entry of the adoption judgment;

(i) At the time of the hearing the court is authorized to order temporary substitute care when it determines that the minor is in an unsuitable home;

(j) The records of all proceedings concerning custody and adoption of children are confidential, except as provided in s. 63.162; and

(k) The natural parent or parents, the adoptive parent or parents, and the child shall receive the same or similar safeguards, guidance, counseling, and supervision in an intermediary adoption as they receive in an agency or department adoption.

63.032 Definitions.—As used in this act, unless the context otherwise requires, the term:

(1) "Department" means the Department of Health and Rehabilitative Services.

(2) "Child" means a son or daughter, whether by birth or adoption.

(3) "Court" means any circuit court of this state and, when the context requires, the court of any state that is empowered to grant petitions for adoption.

(4) "Minor" means a person under the age of 18 years.

(5) "Adult" means a person who is not a minor.

(6) "Person" includes a natural person, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, or association, and any other legal entity.

(7) "Agency" means any child-placing agency licensed by the department pursuant to s. 63.202 to place minors for adoption.

(8) "Intermediary" means an attorney or physician who is licensed or authorized to practice in this state or, for the purpose of adoptive placements of children from out

of state with citizens of this state, a child-placing agency licensed in another state that is qualified by the department.

(9) "To place" or "placement" means the process of giving or transferring of possession or custody, or arranging for the giving or transferring of possession or custody, of a child by any person to another person for adoption.

(10) "Adoption" means the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir-at-law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock.

(11) "Suitability of the intended placement" includes the fitness of the intended placement, with primary consideration being given to the welfare of the child; the fitness and capabilities of the adoptive parent or parents to function as parent or parents for a particular child; and the compatibility of the child with the home in which the child is intended to be placed.

63.042 Who may be adopted; who may adopt.—

(1) Any person, a minor or an adult, may be adopted.

(2) The following persons may adopt:

(a) A husband and wife jointly;

(b) An unmarried adult, including the natural parent of the person to be adopted;

(c) The unmarried minor natural parent of the person to be adopted; or

(d) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his spouse, and if:

1. The other spouse is a parent of the person to be adopted and consents to the adoption; or

2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent.

(3) No person eligible to adopt under this statute may adopt if that person is a homosexual.

(4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the department or the licensed child-placing agency that such disability or handicap renders such person incapable of serving as an effective parent.

63.043 Mandatory screening or testing for sickle-cell trait prohibited.—No person, firm, corporation, unincorporated association, state agency, unit of local government, or any public or private entity shall require screening or testing for the sickle-cell trait as a condition for employment, for admission into any state educational institution or state-chartered private educational institution, or for becoming eligible for adoption if otherwise eligible for adoption under the laws of this state.

63.052 Guardians designated; proof of commitment.—

(1) For minors who have been placed for adoption with and permanently committed to an agency, the agency shall be the guardian of the person of the child; for those who have been placed for adoption with and permanently committed to the department, the department shall be the guardian of the person of the child.

(2) For minors who have been placed for adoption with or voluntarily surrendered to an agency, but have not been

permanently committed to the agency, the agency shall have the responsibility and authority to provide for the needs and welfare for such minors. For those minors placed for adoption with or voluntarily surrendered to the department, but not permanently committed to the department, the department shall have the responsibility and authority to provide for the needs and welfare for such minors. The department or agency shall have the authority to authorize all appropriate medical care for the children who have been placed for adoption with or voluntarily surrendered to them.

(3) The recital in the written consent given by the department that the child sought to be adopted has been permanently committed to the department shall be prima facie proof of such commitment. The recital in the written consent given by a licensed child-placing agency or the declaration in an answer or recommendation filed by a licensed child-placing agency that the child has been permanently committed and the agency is duly licensed by the department shall be prima facie proof of such commitment and of such license.

(4) Unless otherwise authorized by law, the department shall not be responsible for expenses incurred by licensed child-placing agencies or intermediaries participating in placement of a child for the purposes of adoption.

63.062 Persons required to consent to adoption.—

(1) Unless consent is excused by the court, a petition to adopt a minor may be granted only if written consent has been executed after the birth of the minor by:

(a) The mother of the minor,

(b) The father of the minor, if:

1. The minor was conceived or born while the father was married to the mother.

2. The minor is his child by adoption.

3. The minor has been established by court proceeding to be his child.

4. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the minor and has filed such acknowledgment with the vital statistics office of the Department of Health and Rehabilitative Services.

5. He has provided the child with support in a repetitive, customary manner.

(c) The minor, if more than 12 years of age, unless the court in the best interest of the minor dispenses with the minor's consent.

(2) The court may require that consent be executed by:

(a) Any person lawfully entitled to custody of the minor; or

(b) The court having jurisdiction to determine custody of the minor, if the person having physical custody of the minor has no authority to consent to the adoption.

(3) If the minor has previously been permanently committed to a licensed child-placing agency or the department, consent may be given by the licensed child-placing agency or the department, to which the minor has been so committed, and this consent is sufficient.

(4) A petition to adopt an adult may be granted if:

(a) Written consent to adoption has been executed by the adult and the adult's spouse, if any.

(b) Written consent to adoption has been executed by the natural parent or parents, if any, or proof of service of process has been filed, showing notice has been served on the parent or parents as provided herein.

63.072 Persons whose consent to an adoption may be waived.—The court may excuse the consent of the following individuals to an adoption:

(1) A parent who has deserted a child without affording means of identification or who has abandoned a child;

(2) A parent whose parental rights have been terminated by order of a court of competent jurisdiction;

(3) A parent judicially declared incompetent for whom restoration of competency is medically improbable;

(4) A legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent for a period of 60 days or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably; or

(5) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is excused by reason of prolonged, unexplained absence, unavailability, incapacity, or circumstances that are found by the court to constitute unreasonable withholding of consent.

63.082 Execution of consent; family medical history.—

(1) Consent shall be executed as follows:

(a) If by the person to be adopted, by oral or written statement in the presence of the court or by being acknowledged before a notary public.

(b) If by an agency, by affidavit from its authorized representative.

(c) If by any other person, in the presence of the court or by affidavit.

(d) If by a court, by an appropriate order or certificate of the court.

(2) A consent that does not name or otherwise identify the adopting parent is valid if the consent contains a statement by the person consenting that the consent was vol-

untarily executed and that identification of the adopting parent is not required for granting the consent.

(3)(a) The Department of Health and Rehabilitative Services shall provide a consent form and a family medical history form to an intermediary who intends to place a child for adoption. Said forms completed by the natural parent or parents shall be attached to the petition and shall contain such biological and sociological information, or such information as to the family medical history, regarding the child and the natural parents as is required by the department. The department shall incorporate the information into the preliminary study and the social investigation. The court may also require that the natural mother be interviewed by a representative of the department.

(b) Consent executed by the department, by a licensed child-placing agency, or by appropriate order or certificate of the court shall be attached to the petition and shall be accompanied by a family medical history which shall contain such information concerning the medical history of the child and the natural parents as is available or readily obtainable.

(4) The consent shall be executed only after the birth of the child, in the presence of two witnesses, and be acknowledged before a notary public.

(5) Consent may be withdrawn only when the court finds that the consent was obtained by fraud or duress.

63.085 Disclosure by intermediary.—

(1) An intermediary shall disclose the following circumstances to a person or persons who are seeking to adopt a child being placed for adoption by the intermediary:

(a) That the payment of the medical or hospital care received by the natural mother or by the minor during the mother's prenatal care and confinement or of the living

expenses of the natural mother does not guarantee that the natural mother will give the required consent for adoption of the child.

(b) That a consent for adoption which is executed pursuant to s. 63.082 is binding from the time of valid execution of consent, unless it is shown that the consent was obtained by fraud or duress.

(c) That the termination of parental rights will occur simultaneously with the finalization of the adoption, which will be 90 days after placement.

(d) That, pursuant to s. 63.182, for a period of 1 year from the entry of a judgment of adoption, any irregularity or procedural defect in the adoption proceeding may be the subject of an appeal contesting the validity of the judgment.

(2) The intermediary shall obtain a statement signed by the person or persons seeking to adopt a child that such person or persons have been informed of the circumstances enumerated in subsection (1). A copy of the statement shall be maintained in the files of the intermediary, and a copy shall accompany the report to the department of intended placement as required by s. 63.092.

63.092 Report to the department of intended placement by an intermediary; preliminary study; injunction against intermediary.—

(1) The intermediary shall report any intended placement of a minor for adoption with any person not related within the third degree or a stepparent if the intermediary has knowledge of, or participates in, such intention to place. The report shall be made to the Department of Health and Rehabilitative Services at least 30 days prior to the placement of a minor in the home. In exceptional cases when placement is immediately possible, the 30-day requirement may be waived by the Department of Health

and Rehabilitative Services if it is determined to be in the best interest of the child; however, prior to the placement, the report of the intermediary must be submitted to the department, and the preliminary study must have been completed by the department. The report shall contain:

(a) The name and address of the person with whom the minor is intended to be placed.

(b) The identification of the child proposed for placement.

(c) The intended placement date.

(d) A copy of the signed statement required by s. 63.085.

(e) Additional information requested by the department.

The court may waive the 30-day requirement, but the court may not enter an order waiving the requirement unless the court is satisfied that it is in the best interest of the child; that the department has been notified by the intermediary of the intended placement and the intermediary has submitted the required report; and that the department has completed the preliminary study and recommends the placement.

(2) A preliminary study shall be made by the department, or agency designated by the department, for the purpose of determining the suitability of the intended placement and whether the consent of the natural parent or parents has been given on an informed and voluntary basis. The preliminary study shall be completed within 30 days of the receipt by the department of the intermediary's report, but in no event shall the child be placed in the prospective adoptive home prior to the completion of the preliminary study unless ordered by the court. When the petitioner is a stepparent, spouse of the natural parent, or relative, the preliminary study may be required by the court when good cause is shown.

(3)(a) In the preliminary study, the department or agency shall include interviews with the:

1. Natural mother.

2. Natural father, if his consent would be required under s. 63.062(1)(b);

3. Person or persons seeking to adopt the child; and

4. Child, if more than 12 years of age, unless the court in the best interests of the child dispenses with the child's consent under s. 63.062(1)(c).

(b) The court may permit the department or agency to omit from its study an interview with the natural mother or natural father if good cause is shown.

(c) The department or agency shall include in its preliminary study all information available to it demonstrating that the consent of the natural parent or parents has been given on an informed and voluntary basis. "An informed basis" means that the natural parent or parents have been given information concerning, and have knowledge of, available alternative procedures should the intended placement by the intermediary not be completed.

(d) A written recommendation based on the preliminary study shall be mailed to the intermediary and to the petitioner, upon the completion of the preliminary study.

(4) If the preliminary study is favorable, the minor may be placed in the home pending entry of the judgment of adoption. Under no circumstances may the minor be placed in the home if the preliminary study is unfavorable, unless the court, finding the preliminary study not to be supported by the substantial weight of the evidence, orders that the minor be placed in the home pending final action.

(5) In the event of an unfavorable preliminary study, the intermediary or petitioner may within 20 days of receipt of a copy of the written recommendation petition the

court for a determination as to the suitability of the intended placement. A determination as to suitability under this section shall not act as a presumption of suitability at the final hearing. In the event that the parties do not contest an unfavorable recommendation by the department or agency, the intermediary shall file a written report with the department or agency concerning what plan has been made for the child. Regardless of the nature of the preliminary study, the department or agency shall be required to determine the status of the child and take any action needed for the child's protection in any case in which 6 months elapses from the initial filing of the petition for adoption without any final action.

(6) In the event that an unfavorable preliminary study prevents the immediate placement of the child with the intended adoptive parents, the child shall be placed in the care of the department or a licensed child-caring agency, or shall remain in the custody of the parent.

(7) If the child is ultimately placed with the parent or parents seeking to adopt the child, the department or agency preparing the preliminary study shall, within 90 days after the placement, conduct two scheduled visits with the child and the child's adoptive parent or parents, one of which visits shall be in their home, to determine the suitability of the placement. In the event that the department or agency finds the placement unsuitable, it shall so inform the court and the intermediary, in writing; and the court, after notice to all affected parties and after a hearing, shall take such action as it deems necessary, including removal of the child from the home. If at any time prior to the discharge of the responsibilities of the department or agency the family moves to another state, the department or agency shall notify the agency most similar to the department in the state in which the family is at that time residing for the purpose of protecting the child's interests.

(8) The person or persons seeking the adoption shall pay the department or agency an amount equal to the value or cost of all services performed, including, but not limited to, conducting the preliminary study, counseling, and post-placement services, unless the court, finding that the person or persons seeking to adopt the child are financially unable to pay all or any part of such amount, orders that they pay a lesser amount or nothing.

(9) Upon a finding by the department that an intermediary has violated the provisions of this section, the department is authorized to obtain an injunction to prohibit the intermediary from placing a minor for adoption in the future.

63.097 Approval of fees to intermediaries.—Any fee, including those costs as set out in s. 63.212(1)(d), over $500 paid to an intermediary other than actual, documented medical costs, court costs, and hospital costs must be approved by the court prior to payment to the intermediary.

63.102 Filing of petition; venue.—

(1) A proceeding for adoption shall be commenced by filing a petition entitled, "In the Matter of the Adoption of ___ " in the circuit court. The person to be adopted shall be designated in the caption in the name by which he is to be known if the petition is granted. If the child is placed for adoption by an agency, any name by which the child was previously known shall not be disclosed in the petition, the notice of hearing, or the judgment of adoption.

(2) A petition for adoption shall be filed in the county where the petitioner or petitioners or the child resides or where the agency in which the child has been placed is located.

(3) If the filing of the petition for adoption in the county where the petitioner or child resides would tend to endanger the privacy of the petitioner or child, the petition for adoption may be filed in a different county, provided the substantive rights of any person will not thereby be affected.

63.112 Petition for adoption; description.—

(1) A sufficient number of copies of the petition for adoption shall be signed and verified by the petitioner and filed with the clerk of the court so that service may be made under subsection (4) and shall state:

(a) The date and place of birth of the person to be adopted, if known;

(b) The name to be given to the person to be adopted;

(c) The date petitioner acquired custody of the minor and the name of the person placing the minor;

(d) The full name, age, and place and duration of residence of the petitioner;

(e) The marital status of the petitioner, including the date and place of marriage, if married, and divorces, if any;

(f) The facilities and resources of the petitioner, including those under a subsidy agreement, available to provide for the care of the minor to be adopted;

(g) A description and estimate of the value of any property of the person to be adopted;

(h) The name and address, if known, of any person whose consent to the adoption is required, but who has not consented, and facts or circumstances that excuse the lack of consent; and

(i) The reasons why the petitioner desires to adopt the person.

(2) The following documents are required to be filed with the clerk of the court at the time the petition is filed;

(a) The required consents, unless consent is excused by the court.

(b) The favorable recommendation of the Department of Health and Rehabilitative Services or agency as to the suitability of the home in which the minor has been placed.

(3) Unless ordered by the court, no report or recommendation is required when the placement is a stepparent adoption or when the child is related to one of the adoptive parents within the third degree.

(4) The clerk of the court shall mail a copy of the petition within 24 hours after filing, and execute a certificate of mailing, to the department and the agency placing the minor, if any.

63.122 Notice of hearing on petition; investigation.

(1) After the petition to adopt a minor is filed, the court shall fix a time and place for hearing the petition. The hearing shall not be set until at least 90 days after the placing of the minor in the physical custody of the petitioner under the supervision of the Department of Health and Rehabilitative Services or an agency. When the petitioner is a spouse of the natural parent, the hearing may be held immediately after the filing of the petition.

(2) Notice of hearing shall be given as prescribed by the rules of civil procedure, and service of process shall be made as specified by law for civil actions.

(3) Upon a showing by the petitioner that the privacy of the petitioner or child may be endangered, the court may order the names of the petitioner or child, or both, to be deleted from the notice of hearing and from the copy of the petition attached thereto, provided the substantive rights of any person will not thereby be affected.

(4) Notice of the hearing shall be given by the petitioner to:

(a) The department or any agency placing the minor.

(b) The intermediary.

(c) Any person whose consent to the adoption is required by this act who has not consented, unless such person's consent is excused by the court.

(d) Any person who is seeking to withdraw consent.

(5) An investigation shall be made by the agency or by the department to ascertain whether the adoptive home is a suitable home for the minor and the proposed adoption is in the best interest of the minor. Unless directed by the court, an investigation and recommendation are not required when the petitioner is a stepparent or when the child is related to one of the adoptive parents within the third degree.

(6) A written report of the investigation shall be filed with the court and with the petitioner by the investigator within 90 days from the date of the filing of the petition.

(7) The report of the investigation shall contain an evaluation of the placement with a recommendation on the granting of the petition for adoption and any other information the court requires regarding the petitioner or the minor. When the placement has been made through the department or an agency, the report may be limited to a recommendation on the desirability of the adoption.

(8) The department or the agency making the required investigation may request other departments or agencies within or without this state to make investigations of designated parts of the inquiry and to make a written report to the department or agency.

(9) After filing the petition to adopt an adult, a notice of the time and place of the hearing shall be given to any

person whose consent to the adoption is required but who has not consented. The court may order an appropriate investigation to assist in determining whether the adoption is in the best interest of the persons involved.

63.132 Report of expenditures and receipts.—

(1) Before the time set for the hearing, the petitioner and any intermediary shall each file two copies of an affidavit containing a full accounting of all disbursements and receipts of anything of value, including professional fees, made or agreed to be made by or on behalf of the petitioner and any intermediary in connection with the adoption. The clerk of the court shall forward a copy of the affidavit to the Department of Health and Rehabilitative Services. The report shall show any expenses or receipts incurred in connection with:

(a) The birth of the minor.

(b) The placement of the minor with the petitioner.

(c) The medical or hospital care received by the mother or by the minor during the mother's prenatal care and confinement.

(d) The living expenses of the natural mother.

(e) The services relating to the adoption or to the placement of the minor for adoption that were received by or on behalf of the petitioner, the intermediary, either natural parent, the minor, or any other person.

(2) The court may require such additional information as is deemed necessary.

(3) This section does not apply to an adoption by a stepparent whose spouse is a natural or adoptive parent of the child.

63.142 Hearing; judgment of adoption.—

(1) The petitioner and the person to be adopted shall appear at the hearing on the petition, unless:

(a) The person is a minor under 12 years of age, or

(b) The presence of either is excused by the court for good cause.

(2) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition.

(3)(a) If the petition is dismissed, the court shall determine the person that is to have custody of the minor.

(b) If the petition is dismissed, the court shall state with specificity the reasons for the dismissal.

(4) At the conclusion of the hearing, when the court determines that all necessary consents have been obtained and that the adoption is in the best interest of the person to be adopted, a judgment of adoption shall be entered.

63.152 Application for new birth record.—Within 30 days after entry of a judgment of adoption, the clerk of the court shall prepare a certified statement of the entry for the state registrar of vital statistics on a form provided by the registrar. A new birth record containing the necessary information supplied by the certificate shall be issued by the registrar on application of the adopting parents or the adopted person.

63.162 Hearings and records in adoption proceedings; confidential nature.—Notwithstanding any other law concerning public hearings and records:

(1) All hearings held in proceedings under this act shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the

adoption and are required to consent, and representatives of the agencies who are present to perform their official duties.

(2) All papers and records pertaining to the adoption, including the original birth certificate, whether part of the permanent record of the court or of a file in the Department of Health and Rehabilitative Services or in an agency, are subject to inspection only upon order of the court; however, the petitioner in any proceeding for adoption under this chapter may, at the option of the petitioner, make public the reasons for a denial of the petition for adoption. Such order shall specify which portion of the records are subject to inspection, and it may exclude the name and identifying information concerning the natural parent or adoptee. In the case of a nonagency adoption, the department shall be given notice of hearing and be permitted to present to the court a report on the advisability of disclosing or not disclosing information pertaining to the adoption. In the case of an agency adoption, the agency shall be given notice of hearing and be permitted to present to the court a report on the advisability of disclosing or not disclosing information pertaining to the adoption. Nothing in this subsection shall be construed to mean that the department shall not have the right to inspect and copy any official record pertaining to the adoption that is maintained by the department and that any licensed child-placing agency shall not have the right to inspect and copy any official record pertaining to the adoption that is maintained by the agency.

(3) The court files, records, and papers in the adoption of a minor shall be indexed only in the name of the petitioner, and the name of the minor shall not be noted on any docket, index, or other record outside the court file, except that closed agency files may be cross-referenced in the original and adoptive names of the minor.

(4) No person shall disclose from the records the name and identity of a natural parent, an adoptive parent, or an adoptee unless:

(a) The natural parent authorizes in writing the release of his name;

(b) The adoptee, if 18 or more years of age, authorizes in writing the release of his name; or, if the adoptee is less than 18 years of age, written consent to disclose his name is obtained from an adoptive parent;

(c) The adoptive parent authorizes in writing the release of his name; or

(d) Upon order of the court for good cause shown. In determining whether good cause exists, the court shall give primary consideration to the best interests of the adoptee, but shall also give due consideration to the interests of the adoptive and natural parents. Factors to be considered in determining whether good cause exists include, but are not limited to:

1. The reason the information is sought;

2. The existence of means available to obtain the sought-after information without disclosing the identity of the natural parents, such as by having the court, a person appointed by the court, the department, or the agency contact the natural parents and request specific information;

3. The desires, to the extent known, of the adoptee, the adoptive parents, and the natural parents;

4. The age, maturity, judgment, and expressed needs of the adoptee; and

5. The recommendation of the department or the agency which prepared the preliminary study, or the department if no such study was prepared, concerning the advisability of disclosure.

(5) The adoptee or other person seeking information under this section shall pay the department or agency making reports or recommendations as required hereunder a reasonable fee for its services and expenses.

(6) Subject to the provisions of subsection (4), no identifying information regarding the natural parents, adoptive parents, and adoptee shall be disclosed unless a natural parent, adoptive parent, or adoptee has authorized in writing the release of such information concerning himself. No specific names or identifying information shall be given in a family medical history. All nonidentifying information, including the family medical history and social history of the adoptee and the natural parents, when available, shall be furnished to the adopting parents prior to finalization of the adoption and to the adoptee, upon his request, after he reaches majority. Upon the request of the adoptive parent, all nonidentifying information obtained prior to or subsequent to the adoption shall be furnished to the adoptive parent.

63.165 State registry of adoption information; duty to inform and explain.—Prior to the termination of parental rights, the department or agency shall inform the natural parents in writing of the existence and purpose of the registry established under s. 382.51, but failure to do so shall not affect the validity of any proceeding under this chapter.

63.172 Effect of judgment of adoption.—

(1) A judgment of adoption, whether entered by a court of this state, another state, or of any other place, has the following effect:

(a) It relieves the natural parents of the adopted person, except a natural parent who is a petitioner or who is married to a petitioner, of all parental rights and responsibilities.

(b) It terminates all legal relationships between the adopted person and his relatives, including his natural parents, except a natural parent who is a petitioner or who is married to a petitioner, so that the adopted person thereafter is a stranger to his former relatives for all purposes, including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after entry of the adoption judgment, that do not expressly include the adopted person by name or by some designation not based on a parent and child or blood relationship.

(c) It creates the relationship between the adopted person and the petitioner and all relatives of the petitioner that would have existed if the adopted person were a legitimate blood descendant of the petitioner. This relationship shall be created for all purposes, including inheritance and applicability of statutes, documents, and instruments, whether executed before or after entry of the adoption judgment, that do not expressly exclude an adopted person from their operation or effect.

(2) If a parent of a child dies without the relationship of parent and child having been previously terminated and a spouse of the living parent thereafter adopts the child, the child's right of inheritance from or through the deceased parent is unaffected by the adoption.

63.182 Appeal and validation of judgment.—After 1 year from the entry of a judgment of adoption, any irregularity or procedural defect in the proceedings is cured, and the validity of the judgment shall not be subject to direct or collateral attack because of any irregularity or procedural defect. Any defect or irregularity of, or objection to, a consent that could have been cured had it been made during the proceedings shall not be questioned after the time for taking an appeal has expired.

63.192 Recognition of foreign judgment affecting adoption.—A judgment of court terminating the relation-

ship of parent and child or establishing the relationship by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state, and the rights and obligations of the parties on matters within the jurisdiction of this state shall be determined as though the judgment were issued by a court of this state.

63.202 Authority to license.—

(1) The Department of Health and Rehabilitative Services is authorized and empowered to license child welfare agencies that it determines to be qualified to place minors for adoption.

(2) No agency shall place a minor for adoption unless such agency is licensed by the department.

63.207 Out-of-state placement.—

(1) Unless the child is to be placed with a relative within the third degree or with a stepparent, no person except an agency or the Department of Health and Rehabilitative Services shall:

(a) Take or send a child out of the state for the purpose of placement for adoption; or

(b) Place or attempt to place a child for the purpose of adoption with a family whose primary residence and place of employment is in another state.

(2) No intermediary shall counsel a natural mother to leave the state for the purpose of giving birth to a child outside the state in order to secure a fee in excess of that permitted under s. 63.097 when it is the intention that the child is to be placed for adoption outside the state.

63.212 Prohibited acts; penalties for violation.—

(1) It is unlawful for any person:

(a) Except the Department of Health and Rehabilitative Services or an agency, to place or attempt to place without the state a child for adoption unless the child is placed with a relative within the third degree or with a stepparent.

(b) Except the Department of Health and Rehabilitative Services or an agency, to place or attempt to place a child for adoption with a family whose primary residence and place of employment is in another state unless the child is placed with a relative within the third degree or with a stepparent.

(c) Except the Department of Health and Rehabilitative Services, an agency, or an intermediary, to place or attempt to place within the state a child for adoption unless the child is placed with a relative within the third degree or with a stepparent. This [1]prohibition, however, does not apply to a person who is placing or attempting to place a child for the purpose of adoption with the Department of Health and Rehabilitative Services or an agency or through an intermediary.

(d) To sell or surrender, or to arrange for the sale or surrender of, a child to another person for money or anything of value or to receive such minor child for such payment or thing of value. If a child is being adopted by a relative within the third degree or by a stepparent, or is being adopted through the Department of Health and Rehabilitative Services, an agency, or an intermediary, nothing herein shall be construed as prohibiting the person who is contemplating adopting the child from paying the actual prenatal care and living expenses of the mother of the child to be adopted, nor from paying the actual living and medical expenses of such mother for a reasonable time, not to exceed 30 days, after the birth of the child.

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[1] **Note.**—The word "prohibition" was inserted by the editors.

(e) Having the rights and duties of a parent with respect to the care and custody of a minor to assign or transfer such parental rights for the purpose of, incidental to, or otherwise connected with, selling or offering to sell such rights and duties.

(f) To assist in the commission of any act prohibited in paragraph (a), paragraph (b), paragraph (c), paragraph (d), or paragraph (e).

(g) Except the Department of Health and Rehabilitative Services or an agency, to charge or accept any fee or compensation of any nature from anyone for making a referral in connection with an adoption.

(h) Except the Department of Health and Rehabilitative Services, an agency, or an intermediary, to advertise or offer to the public, in any way, by any medium whatever the placement of a child for adoption.

(2) Nothing herein shall be construed to prohibit a licensed child-placing agency from charging fees reasonably commensurate to the services provided.

(3) It is unlawful for any intermediary to fail to report to the department, at least 30 days prior to placement, unless waived by the department as provided for in s. 63.092(1), the intended placement of a child for purposes of adoption with any person not a stepparent or a relative within the third degree, if the intermediary participates in such intended placement.

(4) It is unlawful for any intermediary to charge any fee, including those costs as set out in paragraph (1)(d), over $500 other than for actual documented medical costs, court costs, and hospital costs unless such charges are approved by the court prior to payment to the intermediary.

(5) It is unlawful for any intermediary to counsel a natural mother to leave the state for the purpose of giving

birth to a child outside the state in order to secure a fee in excess of that permitted under s. 63.097 when it is the intention that the child be placed for adoption outside the state.

(6) A person who violates any provision of this section, excluding paragraph (1)(h), is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A person who violates paragraph (1)(h) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.083; and each day of continuing violation shall be considered a separate offense.

63.222 Effect on prior adoption proceedings.—Any adoption made before the effective date of this act shall be valid, and any proceedings pending on the effective date of this act are not affected thereby.

63.232 Duty of person adopting.—In order to protect the rights of all the parties involved in an adoption, any person adopting or attempting to adopt another person shall comply with the procedures established by this act.

CHAPTER 39

PROCEEDINGS RELATING TO JUVENILES

PART I GENERAL PROVISIONS (ss. 39.001- 39.015)

PART II DELINQUENCY CASES (ss. 39.02- 39.337)

PART III DEPENDENCY CASES (ss. 39.40-39- 415)

PART IV INTERSTATE COMPACT ON JUVENILES (ss. 39.51- 39.516)

PART I

GENERAL PROVISIONS

39.001 Short title, purposes, and intent.–

(1) This chapter shall be known and may be cited as the "Florida Juvenile Justice Act."

(2) The purposes of this chapter are:

(a) To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases.

(b) To assure to all children brought to the attention of the courts, either as a result of their misconduct or because of neglect or mistreatment by those responsible for their

care, the care, guidance, and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interests of the state.

(c) To preserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when the child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a child must be permanently removed from the custody of his parents, that the child be placed in an approved home and be made a member of the family by adoption.

(d) To provide procedures by which the provisions of the law are executed and enforced as will assure the parties fair hearings at which their rights as citizens are recognized and protected.

(e) To assure that the prosecution and disposition of a child charged and found to have committed a violation of Florida law be exercised with appropriate discretion and in keeping with the seriousness of the offense and that all findings made under this chapter be based upon facts presented at a hearing that meets the constitutional standard of fundamental fairness.

(3) It is the intent of the Legislature that this chapter be liberally interpreted and construed in conformity with its declared purposes.

39.002 Legislative intent.—It is a goal of the Legislature that the children of this state be provided with the following protections:

(1) A permanent and stable home.

(2) A safe and nurturing environment which will preserve a sense of personal dignity an integrity.

(3) Adequate nutrition, shelter, and clothing.

(4) Effective treatment to address physical, social, and emotional needs, regardless of geographical location.

(5) Protection from abuse, neglect, and exploitation.

(6) Equal opportunity and access to quality and effective education, which will meet the individual needs of each child, and to recreation and other community resources to develop individual abilities.

(7) Access to preventive services.

(8) An independent, trained advocate, when intervention is necessary and a skilled guardian or caretaker in a safe environment when alternative placement is necessary.

39.01 Definitions.—When used in this chapter:

(1) "Abandoned" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the person responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or person primarily responsible for the child's welfare to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. The failure of any such person to appear in response to actual or constructive service in a dependency proceeding may give rise to a rebuttable presumption of such person's ability to provide for and communicate with the child.

(2) "Abuse" means any willful act that results in any physical, mental, or sexual injury that causes or is likely

to cause the child's physical, mental, or emotional health to be significantly impaired.

(3) "Adjudicatory hearing" means a hearing provided for under s. 39.09(1), in delinquency cases, or s. 39.408(1), in dependency cases.

(4) "Adult" means any natural person other than a child.

(5) "Authorized agent of the department" means a person assigned or designated by the department to perform duties or exercise powers pursuant to this chapter.

(6) "Caretaker/homemaker" means an authorized agent of the department who shall remain in the child's home with the child until a parent, legal guardian, or relative of the child enters the home and is capable of assuming and agrees to assume charge of the child.

(7) "Child" means any unmarried person under the age of 18 alleged to be dependent or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years.

(8) "Child who has committed a delinquent act" means a child who, pursuant to the provisions of this chapter, is found by a court to have committed a felony, a misdemeanor, contempt of court, or a violation of a local penal ordinance and whose case has not been prosecuted as an adult case, except that this definition shall not include an act constituting contempt of court arising out of a dependency proceeding.

(9) "Child who is found to be dependent" means a child who, pursuant to this chapter, is found by the court:

(a) To have been abandoned, abused, or neglected by his parents or other custodians.

(b) To have been surrendered to the department or a licensed child-placing agency for purpose of adoption.

(c) To have persistently run away from his parents or legal guardian despite reasonable efforts of the parent or

guardian and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts may include such things as good faith participation in family and individual counseling.

(d) To be habitually truant from school while being subject to compulsory school attendance.

(e) To have persistently disobeyed the reasonable and lawful demands of his parents or other legal custodians and to be beyond their control despite reasonable efforts of the parents or illegal custodians and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts may include such things as good faith participation in family and individual counseling.

(f) To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, or the department, whereupon, pursuant to the requirements of s. 409.168, a performance agreement has expired and the parent or parents have failed to substantially comply with the requirements of the agreement.

(10) "Community control" means the legal status of probation created by law and court order in cases involving a child who has been found to have committed a delinquent act. Community control is an individualized program in which the freedom of the child is limited and the child is restricted to noninstitutional quarters or restricted to the child's home in lieu of commitment to the custody of the department in a training school, halfway house, or other residential program of the department.

(11) "Court," unless otherwise expressly stated, means the circuit court.

(12) "Crisis home" means a homelike facility authorized by the department for the temporary placement and care of a child who does not require detention or shelter care but who is not able to remain in his own home. A crisis home need not be a licensed facility.

(13) "Department" means the Department of Health and Rehabilitative Services.

(14) "Detention care" means the temporary care of a child in a detention home or nonsecure detention program, including home detention and attention homes as authorized by chapter 959, pending court disposition or execution or a court order.

(15) "Detention hearing" means a hearing provided for under s. 39.032, in delinquency cases, or s. 39.402, in dependency cases.

(16) "Detention home" means a facility used pending court disposition or execution of court order for the temporary care of a child alleged or found to have committed a violation of law. A detention home may provide secure or nonsecure custody. A facility used for the commitment of adjudicated delinquents shall not be considered a detention home.

(17) "Disposition hearing" means a hearing provided for under s. 39.09(3), in delinquency cases, or s. 39.408(2), in dependency cases.

(18) "Halfway house" means a community-based residential program for 12 or more committed delinquents that is operated by the department.

(19) "Intake" means the acceptance of a law enforcement report or complaint and the screening thereof to determine whether action by the court is warranted, the disposition of the report or complaint without court or public agency action when appropriate, the referral of the child to another public or private agency when appropriate, the referral of the child to another public or private agency when appropriate, and the recommendation by the intake officer of court action when appropriate.

(20) "Intake officer" means the authorized agent of the department performing the intake function for a child alleged to be delinquent or dependent.

(21) "Judge" means the circuit judge exercising jurisdiction pursuant to this chapter.

(22) "Legal custody" means a legal status created by court order or letter of guardianship which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care.

(23) "Licensed child-caring agency" means a person, society, association, or agency licensed by the department to care for, receive, and board children.

(24) "Licensed child-placing agency" means a person, society, association, or institution licensed by the department to care for, receive, or board children and to place children in a licensed child-caring institution or a foster or adoptive home.

(25) "Likely to injure oneself" means that, as evidenced by violent or other actively self-destructive behavior, it is more likely than not that within a 24-hour period the child will attempt to commit suicide or inflict serious bodily harm on himself.

(26) "Likely to injure others" means that it is more likely than not that within a 24-hour period the child will inflict serious and unjustified bodily harm on another person.

(27) "Neglect" occurs when the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the person primarily responsible for the child's welfare deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be

in danger of being significantly impaired. The foregoing circumstances shall not be considered neglect if caused primarily by financial inability unless services for relief have been offered and rejected. A parent or guardian legitimately practicing his religious beliefs in accordance with a recognized church or religious organization who thereby does not provide specific medical treatment for a child shall not, for that reason alone, be considered a negligent parent or guardian; however, such an exception does not preclude a court from ordering the following services to be provided, when the health of the child so requires:

(a) Medical services from a licensed physician, dentist, optometrist, podiatrist, or other qualified health care provider; or

(b) Treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.

(28) "Nonsecure detention" means a program for the temporary care of children, pending delinquency adjudication or court disposition.

(29) "Parent" means the natural father or natural mother of a child. If a child has been legally adopted, the term "parent" means the adoptive mother or father of the child.

(30) "Protective supervision" means a legal status created by court order in dependency cases which permits the child to remain in his own home or other placement under the supervision of an agent of the department, subject to being returned to the court during the period of supervision.

(31) "Secure detention facility" means a physically restricting facility for the temporary care of children, pending delinquency adjudication or court disposition.

(32) "Shelter" means a place for the temporary care of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication or after execution of a court order. "Shelter" may include a facility which provides 24-hour continual supervision for the temporary care of a child who is placed pursuant to s. 39.402(5).

(33) "Taken into custody" means the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law.

(34) "To be habitually truant" means that:

(a) The child has been absent from school without the knowledge or justifiable consent of the child's parent or legal guardian and is not exempt from attendance by virtue of being over the age of compulsory school attendance or by meeting the criteria in s. 232.06, s. 232.09, or any other exemptions specified by law or the rules of the State Board of Education;

(b) In addition to the actions described in ss. 230.2313(3)(c) and 232.17, the school administration has completed the following escalating activities to determine the cause, and to attempt the remediation, of the child's truant behavior:

1. One or more meetings have been held between a school attendance professional or school social worker, the child's parent, or guardian, and the child, if necessary, to report and to attempt to solve the truancy problem. However, if the school attendance professional or school social worker has documented the refusal of the parent or guardian to participate in the meetings, then this requirement has been met and the school administration shall proceed to the next escalating activity.

2. Educational counseling has been provided to determine whether curriculum changes would help solve the truancy problem, and, if any changes were indicated, such changes were instituted but proved unsuccessful in remedying the truant behavior. Such curriculum changes may include enrollment of the child in an alternative education program that meets the specific educational and behavioral needs of the child; and

3. Education evaluation, which may include psychological evaluation, has been provided to assist in determining the specific condition, if any, that is contributing to the child's nonattendance. The evaluation must have been supplemented by specific efforts by the school to remedy any diagnosed condition;

(c) A school social worker or other person designated by the school administration, if the school does not have a school social worker, and an intake officer of the department have jointly investigated the truancy problem or, if that was not feasible, have performed separate investigations to identify conditions which may be contributing to the truant behavior; and if, after a joint staffing of the case to determine the necessity for services, such services were determined to be needed, the persons who performed the investigations met jointly with the family and child to discuss any referral to appropriate community agencies for economic services, family or individual counseling, or other services required to remedy the conditions that are contributing to the truant behavior; and

(d) The failure or refusal of the parent or legal guardian or the child to participate, or make a good faith effort to participate, in the activities prescribed to remedy the truant behavior, or the failure or refusal of the child to return to school after participation in activities required by this subsection, or the failure of the child to stop the truant behavior after the school administration and the depart-

ment have worked with the child as described in s. 232.19(3) shall be handled as prescribed in s. 232.19.

(35) "Training school" means one of the following facilities: the Arthur G. Dozier School, the Alyce D. McPherson School, or the Florida School for Boys at Okeechobee.

(36) "Violation of law" means a violation of any law of the United States or of the state which is a misdemeanor or a felony. "Violation of law" also means a violation of a county or municipal ordinance which would be punishable by incarceration if the violation were committed by an adult.

(37) "Waiver hearing" means a hearing provided for under s. 39.09(2).

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PART III

DEPENDENCY CASES

39.40 Procedures and jurisdiction.—

(1) All procedures, including petitions, pleadings, subpoenas, summonses, and hearings, in dependency cases shall be according to the Florida Rules of Juvenile Procedure unless otherwise provided by law.

(2) The circuit court shall have exclusive original jurisdiction of a proceeding in which a child is alleged to be dependent and shall have jurisdiction for the judicial review, pursuant to s. 409.168, of a child voluntarily placed with a licensed child-caring agency, a licensed child-placing

agency, or the department. When the jurisdiction of any child who has been found to be dependent is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 18 years of age.

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39.41 Powers of disposition.—

(1) When any child is adjudicated by a court to be dependent, the court having jurisdiction of the child shall have the power, by order, to:

(a) Place the child under the protective supervision of an authorized agent of the department, either in the child's own home or, the prospective custodian being willing, in the home of a relative of the child or in some other suitable place under such reasonable conditions as the court may direct. Protective supervision shall continue until the court terminates it or until the child reaches the age of 18, whichever date is first.

(b) Place the child in the temporary legal custody of an adult relative willing to care for the child.

(c) Commit the child to a licensed child-caring agency willing to receive the child. Continued commitment to the licensed child-caring agency, as well as all other proceedings under this section pertaining to the child, shall additionally be governed by s. 409.168.

(d) Commit the child to the temporary legal custody of the department. Such commitment shall invest in the department all rights and responsibilities of a legal custodian. The department shall not return any child to the physical care and custody of the person from whom the child was removed, except for short visitation periods, without the approval of the court. The term of such commitment shall continue until terminated by the court or until the child reaches the age of 18. After the child is committed to the temporary custody of the department, all further proceed-

ings under this section shall additionally be governed by s. 409.168.

(e) Change the temporary legal custody or the conditions of protective supervision at a postdisposition hearing subsequent to the initial disposition hearing, without the necessity of another adjudicatory hearing. A child who has been placed in his own home under the protective supervision of an authorized agent of the department, in the home of a relative, or in some other place may be brought before the court by the agent of the department who is supervising the placement or by any other interested person, upon the filing of a petition which alleges a need for a change in the conditions of protective supervision or the placement. If the parents or other custodians deny the need for a change, the court shall hear all parties in person or by counsel, or both. Upon the admission of a need for a change or after such hearing, the court shall enter an order changing the placement, modifying the conditions of protective supervision, or continuing the conditions of protective supervision as ordered.

(f) Permanently commit the child to the department or a licensed child-caring agency willing to receive the child for subsequent adoption if the court finds that it is manifestly in the best interests of the child to do so, and:

1. If the persons served with notice under subsection (4) fail to respond to the notice as provided in paragraph (4)(d); or

2. If the parent or parents have voluntarily executed a written surrender of the child before two witnesses and a notary public or other officer authorized to take acknowledgments; or

3. If the court finds by clear and convincing evidence, at a hearing applying the rules of evidence in use in civil cases, that:

a. The parent or legal custodian or, in the absence of the parent or legal custodian of the child, the person responsible for the child's welfare has abandoned the child for a period of 6 months or longer prior to the filing of the petition for permanent commitment or has abused or neglected the child; or

b. The parent or parents of the child have failed, upon the expiration of a performance agreement entered into or of a plan for permanent placement submitted to and approved by the court under s. 409.168, to comply substantially with such agreement or plan. If the court finds that the failure to comply with the performance agreement or plan is the result of conditions beyond the control of the parent or parents, such failure shall not be used as a ground for permanent commitment.

The department shall prescribe a written surrender form which shall be written in layman's terms in the principal language of the surrendering party and which shall clearly and unambiguously advise the surrendering party of the consequences of the surrender.

(g) Order the natural or adoptive parents of such child or the natural father of a child born out of wedlock who has acknowledged his paternity in writing before the court, or the guardian of such child's estate if possessed of assets which under law may be disbursed for the care, support, and maintenance of such child, to pay the person or institution having custody of such child reasonable sums of money at such intervals as the court may consider adequate and proper for the care, support, maintenance, training, and education of such child. The court, in making such order, shall consider the circumstances and ability of such parents, or the natural father of a child born out of wedlock, to pay and the value of assets of the guardianship estate of such child; and when such order affects the guardianship estate, a certified copy of such order shall be delivered to the judge having jurisdiction of such guard-

ianship estate. The court may from time to time, after considering the financial resources of the persons financially responsible for the child's care, order them, or any of them, to pay a reasonable amount for attorney's fees and the cost of the party maintaining any proceeding under this paragraph or for the care, support, and maintenance of such child, including enforcement and modification proceedings. The court may order the amount to be paid directly to the attorney, who may enforce the order in his name.

(2)(a) If the court commits the child to the temporary legal custody of the department, the disposition order shall include a determination as to whether the department has made a reasonable effort to prevent or eliminate the need for removal of the child from his home. If the child has been removed prior to the disposition hearing, the order shall also include a determination as to whether, after removal, the department has made a reasonable effort to reunify the family. The department shall have the burden of demonstrating that it has made reasonable efforts pursuant to this subsection.

(b) For the purposes of this subsection, the term "reasonable effort" means the exercise of reasonable diligence and care by the department and assumes the availability of appropriate services to meet the needs of the child and family.

(c) In support of its determination as to whether reasonable efforts have been made, the court shall:

1. Enter findings as to whether or not prevention or reunification efforts were indicated;

2. If prevention or reunification efforts were indicated, include a brief description of what appropriate and available prevention and reunification efforts were made; and

3. Indicate why further efforts could or could not have prevented or shortened the separation of the family.

(d) When the first contact of the department with the family occurred during an emergency in which the child could not safely remain at home either because there were no preventive services which could ensure the safety of the child or because, even with appropriate and available services being provided, the safety of the child could not be ensured, the department shall be deemed to have made a reasonable effort to prevent or eliminate the need for removal.

(e) When the severity of the conditions of dependency is such that reunification efforts are inappropriate, the department shall be deemed to have made a reasonable effort for reunification of the family. The department shall have the burden of demonstrating to the court that reunification efforts were inappropriate.

(f) If the court finds that the prevention or reunification effort of the department would not have permitted the child to remain safely at home, the court may commit the child to the temporary legal custody of the department or take any other action authorized by this part.

(3) An agency granted legal custody shall have the right to determine where and with whom the child shall live, but an individual granted legal custody shall exercise all rights and duties personally unless otherwise ordered by the court.

(4) Before the court may permanently commit a child who is dependent to a licensed child-placing agency or the department for subsequent adoption, in addition to the other requirements set forth in this part, the following requirements shall be met:

(a) Notice and a copy of the petition shall be personally served upon the following persons, or forwarded to their addresses by registered mail, specifically notifying them that a petition has been filed:

1. The mother of the child.

2. The father of the child, if:

a. The child was conceived or born while the father was married to the mother;

b. The child is his by adoption;

c. The child has been established by a court proceeding to be his child;

d. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the child and has filed such acknowledgment with the Office of Vital Statistics of the Department of Health and Rehabilitative Services; or

e. He has provided the child with support in a repetitive, customary manner.

3. The legal custodians or guardian of the child.

4. If the natural parents who would be entitled to notice are dead or unknown, a living relative of such child, unless upon diligent search and inquiry no such relative can be found.

(b) In the event a person required to be served with notice in the manner prescribed in paragraph (a) cannot be served, notice of hearings shall be given as prescribed by the rules of civil procedure, and service of process shall be made as specified by law for civil actions.

(c) Notice as prescribed by this section may be waived in the discretion of the judge, with regard to any person to whom notice must be given pursuant to this subsection, if such person executes, before two witnesses and a notary public or other officer authorized to take acknowledgments, a written surrender of the child to a licensed child-placing agency of the department.

(d) If the person served with notice under this section fails to respond within the time prescribed by the rules of civil procedure, the failure to respond shall constitute

consent to permanent commitment on the part of the person given notice.

(5) A licensed child-placing agency or the department to which a child is permanently committed for subsequent adoption in accordance with this chapter may place the child in a family home for prospective subsequent adoption and may thereafter become a party to any proceeding for the legal adoption of the child and appear in any court where the adoption proceeding is pending and consent to the adoption; and that consent alone shall in all cases be sufficient. A permanent order of commitment, whether pursuant to consent or after notice served as herein prescribed, shall permanently deprive the parents and legal guardian of any right to the child. In any subsequent adoption proceeding, the parents and legal guardian shall not be entitled to any notice thereof, nor shall they be entitled to knowledge at any time after the permanent order of commitment is entered of the whereabouts of the child or the identity or location of any person having the custody of or having adopted the child; and in any habeas corpus or other proceeding involving the child brought by any parent or legal guardian of the child, no agent of the licensed child-placing agency or department shall be compelled to divulge that information, but may be compelled to produce the child before a court of competent jurisdiction if the child is still subject to the guardianship of the licensed child-placing agency or department. The entry of the permanent order of commitment shall not entitle the licensed child-placing agency or department to guardianship of the estate or property of the child, but the licensed child-placing agency or department shall be the guardian of the person of the child. The court shall retain jurisdiction over any child permanently committed to a licensed child-placing agency or to the department until the child is placed for adoption. After permanent commitment of a child for subsequent adoption, the court has jurisdiction for the purpose of reviewing the status of the child and

the progress being made toward permanent adoptive placement, pursuant to the provisions of s. 409.168, but this jurisdiction does not include the exercise of any power or influence by the court over the selection of an adoptive parent.

(6) In carrying out the provisions of this chapter, the court may order the natural parents or legal guardian of a child who is found to be dependent to participate in family counseling and other professional counseling activities deemed necessary for the rehabilitation of the child.

(7) With respect to a child who is the subject of a performance agreement under s. 409.168, the court shall return the child to the custody of the natural parents upon expiration of the agreement if the parents have substantially complied with the agreement.

(8) The court may at any time enter an order ending its jurisdiction over any child, except that, when a child has been returned to his parents pursuant to subsection (7), the court shall not terminate its jurisdiction over the child until 6 months after the return. Based on a report of the department or agency and any other relevant factors, the court shall then determine whether its jurisdiction should be continued or terminated in such a case; if its jurisdiction is to be terminated, the court shall enter an order to that effect.

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